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DISSERTATION

The minimum wage in Germany and South Africa - a comparative assessment of the extent to which a national minimum wage may contribute to social justice and economic growth in South Africa



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1. INTRODUCTION AND ECONOMIC CONTEXT

1.1 Introduction and objective of dissertation

In May 2018, South Africa will implement a national minimum wage (NMW). Congruent with the 2030 Sustainable Development Agenda of the United Nations, in particular the goal of the reduction of inequality and the promotion of decent work for everyone, a NMW is widely recognised as an important labour market policy instrument to alleviate social injustice and poverty by mitigating wage inequality and facilitating economic growth. In order to advance these goals however an effective legislative framework for a NMW is required, taking into account the prevailing socio-economic context in which the minimum wage will apply. Some of the essential elements that the legal framework must address, and which are considered in this dissertation are: the universal coverage of the minimum wage; the periodic adjustment of the minimum wage; interaction with collective bargaining; and compliance.¹

Research on international experience and the recommendations of the International Labour Organisation (ILO), inform this dissertation and its assessment of the proposed bill for the National Minimum Wage Act in South Africa. The dissertation considers the importance of context and the international law regime for a minimum wage before comparing the proposed National Minimum Wage Bill of South Africa (hereinafter referred to as ‘the Bill’; published in Government Gazette No. 41257 of 17 November 2017) to the institutional and legal framework for the German Minimum Wage Act (Mindestlohngesetz, hereinafter referred to as ‘the MiLoG’) in order to examine if and how a NMW might contribute to social justice and economic growth in South Africa.

It will be shown that a NMW may have major impacts on a country’s economy and its labour market. Considering the different economic conditions in a developed and an emerging economy, the dissertation critically assesses whether the NMW so far contributed to mitigate low pay in Germany; and whether the more vulnerable South African economy can effectively withstand a minimum wage and benefit from its implementation. In this regard, the interplay

¹ Other crucial issues that are important to make a minimum wage effective include the implementation in practice and accompanying policy measures like incentives, information campaign and social grants. To not exceed the scope, this dissertation predominantly focuses on the legal framework.

between collective bargaining and minimum wages will be discussed. The dissertation demonstrates that the successful implementation of a NMW requires a careful assessment of the domestic economy and circumstances. Predominantly based on the experience with the NMW in Germany, it is argued that a well-balanced legal framework is necessary to both avoid negative impacts on the labour market and to provide a measurable benefit to employees.

The structure of the dissertation is as follows: Chapter 2 examines more generally the minimum wage as an intended tool to mitigate inequality and poverty from an international law perspective. Subsequently, the current German minimum wage legislation will be illustrated and set into context in Chapter 3; followed by Chapter 4 in which the National Minimum Wage Bill for South Africa is discussed. In Chapter 5 an assessment will be conducted, which evaluates the Bill's legal framework by linking it to experiences on the MiLoG. Finally, Chapter 6 summarises the findings of this dissertation in a conclusion. In the remainder of Chapter 1, an overview of the South African and German economy and labour market is provided as background to the discussion and analysis on the legal framework for a NMW.

1.2 Economic context: why is it important?

To analyse and assess the proposed Bill and the MiLoG properly, it is necessary to initially consider the economic landscape of both countries. The economic context and the situation of unemployment are crucial indicators not only for setting the initial level of a minimum wage but the context should also inform the legal framework more generally. This section will therefore briefly outline the economic context in South Africa and Germany with emphasis on the unemployment situation and the distribution of low wages. As employment remains a key issue in relation to poverty alleviation, its protection and promotion consequently is of particular importance.

1.2.1 The position in South Africa

South Africa globally ranks as one of the most unequal countries in terms of income and wealth distribution.² Although being still one of the world's leading emerging economies only a minority of the South African population benefit from the economy, while many South

² <http://www.worldbank.org/en/country/southafrica/overview>, accessed on 7 February 2018.

Africans live in poverty.³ According to the World Bank the poorest 20 percent of the population consume only less than 3 percent of total expenditure, while the richest 20 percent consume 65 percent.⁴

1.2.1.1 Economy and wages

Alongside its remarkable peaceful political transition, South Africa became the most industrialized country in Africa.⁵ After the end of apartheid, in 1994, international sanctions were abolished and the South African economy increased rapidly.⁶ The Gross Domestic Product (GDP) almost tripled to over US\$400 billion in 2011⁷ and foreign exchange reserves increased from US\$3 billion to \$50 billion leading to the development of a growing middle-income emerging economy.⁸ Alongside Nigeria, South Africa has by far the largest African economy.⁹ This development constitutes one major reason why South Africa became the first African member of the G-20 and the BRICS association.¹⁰

South Africa benefits from an abundant supply of natural resources and is today one of the world's largest producer of platinum, gold, and chromium.¹¹ Despite the mining industry, the economy is driven by a large agriculture, manufacturing and a whole sale and retail trade sector.¹²

³ The *International Business Report 2012: Emerging markets opportunity index: high growth economies* Grant Thornton (2012) 26.

⁴ Ibid.

⁵ 'Africa's Largest and most Industrialised Economy SA in Technical Recession' *Zambia Business Times* 6 June 2017, available at <https://zambiabusinesstimes.com/2017/06/06/africas-most-industrialised-economy-sa-in-technical-recession/>, accessed on 7 February 2018.

⁶ Murray Leibbrandt, Ingrid Woolard, Hayley McEwen & Charlotte Koep. 'Employment and Inequality Outcomes in South Africa' (2009) 6.

⁷ <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>, accessed on 7 February 2018.

⁸ Tara Kangarlou 'South Africa since apartheid: Boom or bust?' *CNN* 27 November 2013, available at <http://edition.cnn.com/2013/11/27/business/south-africa-since-apartheid/index.html>, accessed on 7 February 2018.

⁹ 'South Africa regains Africa's 'biggest economy' title from Nigeria' *BBC* 11 August 2016, available at <http://www.bbc.com/news/world-africa-37045276>, accessed on 7 February 2018.

¹⁰ Emmanuel Nnadozie & Catherine Grant Makokera 'South Africa and the G-20' 18 August 2014, available at <http://www.gegafrica.org/g20-blog/south-africa-and-the-g-20>, accessed on 7 February 2018.

¹¹ *The Mineral Commodity Summaries 2018* U.S. Geological Survey (2018) 47, 71, 125.

¹² 'Competitiveness of selected South African agricultural products in the European union market' Department: Agriculture, Forestry and Fisheries (January 2011) 3.

In the early 2000s former President Thabo Mbeki significantly facilitated economic growth through incentivizing foreign investment.¹³ Various measures were conducted including easing of restrictive labour laws and the promotion of trade liberalization.¹⁴ The result of this development in South Africa was that the poverty rate dropped from 33.8 percent in 1996 to 16.89 percent by 2008.¹⁵

However, as South Africa successfully integrated itself into the global economy, the country also became vulnerable to global business cycles.¹⁶ According to the International Monetary Fund (IMF) Public Information Notice,

‘[p]rudent countercyclical monetary and fiscal policies, together with a flexible exchange rate, have helped dampen the adverse effects of those global cycles; and sound financial supervision has guided financial institutions in managing the associated risks.’¹⁷

Nevertheless, South Africa recovered quite slowly from this recession.¹⁸ In 2016, economic growth nearly disappeared as the real GDP was estimated only 0.3 percent.¹⁹ For 2018, the GDP rate is at least projected to increase to 1.2 percent.²⁰ This prognosis is based on the fact that agriculture and mining industry largely recovered leading to improvements in consumption and investment thereafter.²¹

Although since the end of apartheid, living conditions have increased substantially for many South Africans, this fortunate development decelerated strongly owing to several serious difficulties.²² Low global economic growth specifically weakens domestic manufacturing and

¹³ Michael Nowak ‘The First Ten Years After Apartheid: An Overview of the South African Economy’ in Michael Nowak and Luca Antonio Ricci (eds) *Post-apartheid South Africa: the first ten years* (2005) 6, 8.

¹⁴ *Ibid* at 8.

¹⁵ According to the World Bank poverty headcount ratio at \$1.90 a day (2011 PPP) -

<http://www.worldbank.org/en/country/southafrica/overview>, accessed on 7 February 2018.

¹⁶ The IMF Country Report No. 11/258 (Staff Report for the 2011 Article IV Consultation) 4.

¹⁷ The IMF Public Information Notice (PIN) No. 11/115 (25 August 2011).

¹⁸ *Ibid*.

¹⁹ The IMF Country Report No. 17/189 (2017 Article IV Consultation – Press Release; Staff Report; and Statement by the Executive Director for South Africa) 5.

²⁰ The World Bank expects real GDP growth of only 0.6 percent in 2017 -

<http://www.worldbank.org/en/country/southafrica/overview>.

²¹ IMF Country Report No. 17/189 op cit note 19 at 6.

²² The murder rate has more than halved and the quality of housing increased (Erin Conway-Smith ‘20 years since apartheid: What’s changed in South Africa, and what hasn’t’ *Global Post* 27 April 2014, available at <https://www.pri.org/stories/2014-04-27/20-years-apartheid-whats-changed-south-africa-and-what-hasn't>, accessed on 7 February 2018).

trade sectors due to a reduced demand for exports from South Africa and leads to low domestic growth. Accordingly, the economy's lacking ability to generate jobs in times of economic stagnation results in a very high unemployment rate increasing from 22.5 percent in 2008 to 27.7 percent in the first quarter of 2017.²³ In addition, structural barriers such as political uncertainties,²⁴ poor infrastructure or an inadequate education system exacerbate unemployment. Not surprisingly, employment and wages have been identified as the leading factors driving inequality in South Africa.²⁵ Still, political instability, structural barriers and an overall slow economic growth maintain a high unemployment rate and low wages, which result in a national poverty line of over 50 per cent of the population.²⁶ Besides, present economic growth is expected to be insufficient to keep pace with the increase in (working-age) population so that unemployment inevitably will even increase.²⁷

Some causes for poverty are closely linked to the current situation in the South African labour market.

First, the high level of unemployment demonstrates that many people depend on welfare benefits to support themselves and their families.²⁸ Promoting employment is therefore crucial to sustainably challenge poverty.

Second, one also must notice that many employees on the South African labour market earn very low salaries.²⁹ More specifically, employed persons in the poorest 20 percent of the households earn an average wage of R1,017 per month followed by employed persons in the second poorest 20 percent earning an average monthly wage of R1,707.³⁰ Putting together both

²³ The unemployment rate would even rise to 36 percent if people who decided to give up looking for work would be included (IMF Country Report No. 17/189 op cit note 19 at 9).

²⁴ Just recently, in March 2017, President Jacob Zuma unpredictably removed his former and well-respected finance minister Pravin Gordhan from office, an action which resulted the downgrade of South Africa's investment-grade status with two of the big three credit-ratings agencies (Fitch Rating and Standard and Poor's) for the first time in 17 years (Marc Davies 'South Africa Is Now Officially In A Recession As The Economy Keeps On Shrinking' *Huffington Post* 6 June 2017, available at http://www.huffingtonpost.co.za/2017/06/06/south-africa-is-now-officially-in-a-recession-as-the-economy-kee_a_22128210/, accessed on 7 February 2018).

²⁵ Leibbrandt et al op cit note 6 at 29.

²⁶ The World Bank as one of the leading institutions in measuring poverty distinguishes between poverty headcount ratio at *national poverty lines*, at *\$3.10 a day* and at *\$1.90 a day* - <http://data.worldbank.org/topic/poverty?locations=ZA-DE>.

²⁷ IMF Country Report No. 17/189 op cit note 19 at 9.

²⁸ The 'National Minimum Wage Panel Report to the Deputy President – Recommendations on Policy and Implementation' (2016) 34.

²⁹ Ibid at 35.

³⁰ Ibid.

groups, they make up more than half of the total population in South Africa and have a narrow unemployment rate of 46.95 percent.³¹

Third, poverty in working households is often owed to the large average number of non-employed persons per employed.³² This mixture of high unemployment, low wages and large household size create an extremely low average household income and impede the challenge to overcome poverty. The comparison of low wages in poor households with the national average of R5,787 and the average wage of the richest 20 percent namely R13,458 shows on the one hand the extend of low wages and on the other hand the huge wage gap in the labour market.³³

Lastly, one must also consider that unemployment significantly differs between the races, leading also to social tensions within the labour market as unemployed black people struggle to reintegrate into the labour market. Whereas about eight percent of the white and 18 percent of the Asians/ Indians are unemployed, the unemployment rate of black people lies around 40 percent.³⁴

To improve the living conditions of many low-income households, the South African government decided to implement a NMW amounting to R20 per hour.³⁵ Nevertheless, despite the above presented current situation of the labour market, one major problem becomes evident: recipients of a NMW must be employed to gain any benefits. In fact, ironically in the poorest households the majority is unemployed and their income is therefore fully derived from government grants.³⁶ These households may particularly benefit from a NMW if it also stimulates economic growth and job creation.

To conclude, the South African labour market is characterized by the huge gap between the wages and incomes leading to an unequal distribution of income. Whereas a relevant number of employees did benefit from rising wages, the poorest people did not benefit as their income predominantly derives from social transfers.³⁷

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Statistics South Africa (2014), available at

https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf, accessed on 7 February 2018.

³⁵ The 'Agreement on the introduction of a National Minimum Wage' (published by the Department of Labour on 7 February 2017).

³⁶ NMW Panel Report op cit note 28 at 37.

³⁷ Ibid at 35.

1.2.1.2 Sectoral distribution of low wages

After highlighting the economic situation in the previous section, this section shall illustrate the distribution of wages in different industry sectors to show which sectors may be affected by a NMW. Additionally, knowledge concerning the distribution is crucial for a later assessment as the National Minimum Wage Panel explicitly declared that its recommendations for a NMW inter alia are based on their assumptions on wage distribution.³⁸ Given that wage income may not only derive from formal sectors but also from informal sectors, data will be used from most appropriate source, namely the ‘Labour Market Dynamics Report of 2014’ (LMDSA).³⁹

The South African economy consists of several key sectors, particularly finance and business services, wholesale and retail trade, manufacturing, construction, agriculture and mining.⁴⁰ According to the LMDSA 2014 dataset, 6.2 million employees, making up 47.3 percent of the employed persons earn less than R3,500 per month. This number comprises 90.7 percent of the employees in private households, 84.5 percent in the agricultural sector, 54.6 percent of all construction workers and 48.2 percent of wholesale and retail workers. In other words, a minimum wage of R20 per hour equivalent to approximately R3,500 per month effects nearly half of the total workforce in South Africa. Moreover, 34.8 percent of all employees earn even less than R2,500 per month, including over 70 percent of the workers in private households and agriculture and around 30 percent in the three biggest sectors wholesale and retail, manufacturing and community service providers. These numbers clearly demonstrate that a NMW affect nearly every sector. In particular domestic and agricultural workers but also workers in sub-sectors of the manufacturing industry such as clothing, textiles and furniture will recognize a measurable and concrete increase of wage.⁴¹

³⁸ Ibid at 38.

³⁹ Data approach is based on the NMW Panel Report; numbers may partly turn out too high in certain wage levels as part-time and informal workers are included (NMW Panel Report op cit note 28 at 38).

⁴⁰ ‘*Competitiveness of selected South African agricultural products in the European union market*’ Department: Agriculture, Forestry and Fisheries (January 2011) 3.

⁴¹ NMW Panel Report op cit note 28 at 45.

1.2.2 The German context

The MiLoG came into force on 1 January 2015. Therefore, this section does not only give an overview on the current socio-economic environment in Germany but also concentrates on the situation in 2015.

1.2.2.1 Economy and wages

Germany is a highly-developed country, the largest economy in Europe and the fourth largest worldwide.⁴² Its GDP of around US\$3,4 Trillion represents 5.4 percent of the global economy.⁴³ Like many other leading economies, the German economy suffered dramatically under the global financial crisis as its annual GDP growth dropped from 3.26 percent in 2007 to -5.62 percent in 2009.⁴⁴ However, recovery measures, including the 400 billion euro rescue fund as well as two economic stimulus packages issued by the German Government, increased real GDP growth from 0.49 percent in 2012 to 1.72 percent to percent in 2015.⁴⁵

After the reunification in 1990, Germany had to manage the transformation of the East German planned economy towards an integrated market economy. This turned out to be very a challenging task as Eastern Germany suddenly became a part of a monetary union as well as part of the customs union of the European Community.⁴⁶

However, although Germany struggled under economic stagnation in the early 2000s including a high unemployment rate, the German economy successfully established as major market. The economic success is particularly based on a very strong export industry, technology and innovation, underpinned by prudent past structural reforms and a well-developed welfare system.⁴⁷ As the economy is highly dependent on exports, consequently Germany was hit hard by the global financial crisis leading to the worst recession since 1949. However, the export economy was one important reason why the economy could recover relatively fast.⁴⁸

⁴² <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>, accessed on 7 February 2018.

⁴³ <https://tradingeconomics.com/germany/gdp>, accessed on 7 February 2018.

⁴⁴ Ibid.

⁴⁵ <http://wits.worldbank.org/CountryProfile/en/Country/DEU/StartYear/2011/EndYear/2015/Indicator/NY-GDP-MKTP-KD-ZG>, accessed on 7 February 2018.

⁴⁶ East German firms suddenly lost their traditional eastern markets and had to compete nationally and globally without tariff protection (Bernd Martens [2010] 'Wirtschaftlicher Zusammenbruch und Neuanfang nach 1990' in bpb *Dossier: Lange Wege der Deutschen Einheit* 63-68).

⁴⁷ The IMF Staff Concluding Statement of the 2017 Article IV Mission (Germany 15 May 2017).

⁴⁸ <http://www.bbc.com/news/world-europe-17300915>, accessed on 7 February 2018.

Major exports are engineering products, especially machinery and shipbuilding, automobiles, electronics, chemical goods and metals.⁴⁹ Moreover, innovative products like wind turbines and solar-power technology are exported from Germany.⁵⁰ Two factors accelerated the economic power of the German export industry. First, the introduction of the euro currency, bolstered by the low-interest-rate policy of the European Central Bank fixed exchange rates in the European market.⁵¹ Due to this development, German products became more competitive as foreign importers did not need to exchange their own currency any more to purchase them. The positive consequence for German firms was a stabilizing effect on the value of their products. Second, the above-mentioned reforms known as ‘Agenda 2010’ successfully reduced unemployment and promoted economic growth. In turn, however, it also led to a stagnation of wage increase, which resulted in a historically low wage share of national income of only 64.5 percent in 2008.⁵² In addition, employers and trade unions agreed on restricting wage growth to facilitate competitiveness particularly in the euro zone.⁵³ Hence, German companies could significantly increase their competitiveness leading to a persistent current-account surplus which exceeds even China’s trade surplus.⁵⁴

Nevertheless, despite reforms and economic success, Germany faces a variety of social and economic challenges. Due to very low birth rate Germany’s population is ageing. This adverse demographic development risks negative impacts on the long-term preservation of the welfare, pension and health spending and exacerbate the lack of young professionals.⁵⁵ Furthermore, the European debt crisis put pressure on German fiscal policies and since 2015, economy and society intensively discussed economic and social impacts of the migrant crisis.⁵⁶ Concerning the latter, it is without doubt that the integration of refugees costs the Government money and may initially harm the German GDP.⁵⁷ However, experts also estimate a chance to compensate

⁴⁹ <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html>, accessed on 7 February 2018

⁵⁰ <https://web.archive.org/web/20061210163253/http://www.german-renewable-energy.com/Renewables/Navigation/Englisch/wind-power.html>, accessed on 7 February 2018.

⁵¹ Christopher Cermak ‘Why Germany’s Surplus Is So Huge’ *Handelsblatt Global* 21 April 2017, available at <https://global.handelsblatt.com/finance/why-germanys-surplus-is-so-huge-752529>, accessed on 7 February 2018.

⁵² The ‘Global Wage Report 2012/13: Wages and equitable growth’ (Geneva, International Labour Office, 2013) 43.

⁵³ ‘Surplus war Germany’s current-account surplus is a problem’ *The Economist* 11 February 2017, available at <https://www.economist.com/news/europe/21716641-not-reasons-donald-trump-thinks-it-germanys-current-account-surplus-problem>, accessed on 7 February 2018.

⁵⁴ Cermak op cit note 51.

⁵⁵ Stefan Wagstyl ‘Germany’s demographic dilemma’ *Financial Times* 16 November 2016, available at <https://www.ft.com/content/a4d8316e-8566-11e6-8897-2359a58ac7a5>, accessed on 7 February 2017.

⁵⁶ Mark Melin ‘Here’s how the refugee crisis is impacting Germany’s economy’ *Business Insider* 29 March 2016, available at <http://www.businessinsider.com/impact-refugee-crisis-on-germanys-economy-2016-3>, accessed on 7 February 2018.

⁵⁷ Ibid.

the aging population through the integration of migrants into the German labour market.⁵⁸ Accordingly, the European Commission states that the high inflow of migrants is likely to stimulate GDP growth in the short term through additional public spending on refugees and housing investment whereas the long-term impact depends on the successful integration into the labour market.⁵⁹

Moreover, throughout the last years it became clearer that not everyone in society was able to benefit from the economic success. According to the Federal Statistical Office, the risk-of-poverty rate increased from 14.7 percent in 2005 up to 15.7 percent in 2015.⁶⁰ This rate applies to every person who have an income less than 60 percent of the German median income. Measuring poverty is difficult and often contentious as it depends on the national circumstances of living.⁶¹ The German government defines poverty more narrowly with the result of 8 million people being poor in 2015.⁶² Without doubt, in terms of quality, poverty in Germany cannot be equated with poverty in South Africa which must be measured by the World Bank criteria. Therefore, according to poverty in Germany the term ‘relative (national) poverty’ would be more precise in contrast to ‘absolute poverty’ in South Africa. The statistics illustrate that at least inequality is a key issue in Germany as well.

Unlike in South Africa, poverty and inequality are not that strongly linked to unemployment. Whereas the unemployment rate decreased significantly from over 11.7 percent in 2007 to under 6.4 percent in 2015, the poverty-risk and minimum-hedging rate have in fact increased.⁶³ Consequently, one must assume that the creation of jobs is not necessary a guarantee to reduce poverty as long as these newly created jobs do not provide enough working hours or adequate pay. This phenomena of ‘working poor’ is underpinned by the fact that in 2014 nearly ten

⁵⁸ The *IMF Country Report No. 16/202* (2016 Article IV Consultation – Press Release; Staff Report; and Statement by the Executive Director for Germany) 13.

⁵⁹ The *Commission Staff Working Document Country Report Germany 2016* (European Commission 26 February 2016) 5, 6.

⁶⁰ Florian Diekmann ‘Armutsrisiko steigt auf höchsten Stand seit Wiedervereinigung’ *Spiegel Online* 16 September 2016, available at <http://www.spiegel.de/wirtschaft/soziales/armut-in-deutschland-das-risiko-steigt-wieder-obwohl-die-wirtschaft-laeuft-a-1112646.html>, accessed on 7 February 2018.

⁶¹ Poverty is often seen as a complex phenomenon which cannot be measured only by the criteria of income. Price differences in different areas, age and social welfare systems cannot be ignored in this equation (See Angelika Finkenwirth & Stefanie Diemand ‘Wie arm sind die Deutschen?’ *Zeit Online* 2 March 2017, available at <http://www.zeit.de/wirtschaft/2017-03/armutsbericht-2017-deutschland-paritaetischer-wohlfahrtsverband-faq>, accessed on 7 February 2018; If one compares poverty in South Africa and Germany it seems logical to define poverty by means of what things a person really needs to not be poor.

⁶² Kolja Rudzio ‘Wie arm ist Deutschland wirklich?’ *Zeit Online* 19 April 2017, available at <http://www.zeit.de/2017/17/armut-deutschland-wirtschaftsboom-sozialhilfe-einkommen>, accessed on 7 February 2018.

⁶³ <https://de.statista.com/statistik/daten/studie/1224/umfrage/arbeitslosenquote-in-deutschland-seit-1995/>; <https://de.statista.com/statistik/daten/studie/164822/umfrage/einkommensreichtum-und-armut-in-deutschland-quoten/>, both accessed on 7 February 2018.

percent of employed people were at the risk of poverty.⁶⁴ In fact, one can conclude that the positive development of the German labour market is predominantly owed to an increase of atypical employment, particularly part-time work recurrent in the service and low-wage sector.⁶⁵

The average monthly gross income of a full-time employed person in 2015 was EUR 3,612⁶⁶ and the average net-income per household amounted in 2014 EUR 3,147.⁶⁷ 17 percent of the employed persons earn an average net income of less than EUR 900 and 36 percent have a net income less than EUR 1,300.⁶⁸ It is striking that the group of 19 percent having a net income between EUR 900 and EUR 1,300 make up the largest group within the whole income distribution. To conclude, whereas the average net-income in Germany is relatively high, a large group of people do not benefit from the economic prosperity and suffer under low wages. Especially single parent households with an average net-income of EUR 2,294 are often at risk of poverty as these households consist of more non-employed persons.⁶⁹

1.2.2.2 Sectoral distribution of low wages in Germany

The data used to illustrate the low-wage sector comes from the German Federal Statistical Office. Based on the common international definition, the Federal Statistical Office uses a low-wage definition based on the median-wage.⁷⁰

According to these statistics, in 2014, 21.4 percent of the employed earned wages below the low-wage line marked at an hourly gross-wage of EUR 10.00.⁷¹ As mentioned above, particularly the service sector includes low-paid branches. Thus, low wages are often earned by taxi drivers (83.7 percent), merchants in retail (83.7 percent), workers in video libraries

⁶⁴ Dorothee Spannagel, Daniel Seikel, Karin Schulze Buschoff & Helge Baumann 'Aktivierungspolitik und Erwerbsarmut in Europa und Deutschland' (2017) WSI-Report Nr.36 1.

⁶⁵ Ibid.

⁶⁶ <https://de.statista.com/statistik/daten/studie/5760/umfrage/verfuegbares-nettoeinkommen---einkommensklassen/>, accessed on 7 February 2018.

⁶⁷ 'Statistisches Jahrbuch 2016' (German Federal Statistical Office 2106) 168.

⁶⁸ Nicolai Kwasniewski & Christina Elmer 'Wo Sie mit Ihrem Einkommen stehen' *Spiegel Online* 6 September 2013, available at <http://www.spiegel.de/wirtschaft/soziales/einkommen-und-gehalt-wo-sie-im-vergleich-liegen-a-920777.html>, accessed on 7 February 2018.

⁶⁹ According to the German Federal Statistical Office, in 2015, one third of the single parent families were at the risk of poverty (Statistisches Jahrbuch 2016 op cit note 67 at 169).

⁷⁰ The median-wage is bound to the specific person standing right in the middle of the line starting with the person having the lowest wage-income and ending with the best-paid person. In other words, 50 percent are earning more and the other 50 percent less than the median-wage.

⁷¹ 'Verdienste auf einen Blick' (German Federal Statistical Office 2017) 8.

(80.5 percent), hair dressers (78.5 percent) as well as in the catering and hospitality sector (77 percent).⁷² Furthermore, also workers in the butchery sector and forestry workers are notoriously low-paid.⁷³

1.2.3 Conclusion

South Africa is an emerging economy whereas Germany is a highly-developed country. Economic power, labour market and poverty vary widely in both countries.

Although South Africa achieved significant economic and social development over the last decades, recently economic growth has stagnated, causing a deterioration of the unemployment situation. A tremendous amount of the people suffers under absolute poverty due to unemployment and low wages. The lack of job creation is owed to a low global economic growth, which hurts the South African export industry as well as to structural domestic barriers. Although many of the poorest people are unemployed, the introduction of a NMW would affect many employees as nearly 50 percent of the South African workforce is struggling with low wages of less than R3,500 per month.

Germany widely recovered from major economic difficulties like the reunification and the global financial crisis. Structural reforms and competitiveness of the German industry facilitated economic growth and remarkably decreased unemployment. However, this development gave not equal benefit to everyone in society. The proportion of people being at the risk of poverty continuously increased and the low-wage sector spread rapidly.

Nevertheless, despite all social and economic differences, although on another scale with respect to poverty and inequality, both countries also have similar problems such that the objectives, considerations and concerns regarding the implementation of a NMW are nonetheless largely congruent. Thus, it is reasonable to compare the German minimum wage legislation with the proposed Bill to assess the efficiency and benefit of the latter.

⁷²https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/_Doorpage/Indikatoren_QualitaetDerArbeit.html?cms_gtp=318944_slot%253D2, accessed on 7 February 2018. (it should be noticed that these figures also include sideline employment and second jobs).

⁷³ <https://www.iwd.de/artikel/die-niedriglohnbranchen-boomen-147596/>, accessed on 7 February 2018.

2. THE MINIMUM WAGE: AN INTERNATIONAL LAW PERSPECTIVE

2.1 Introduction

Before a consideration of the specific national frameworks in Chapter 3 and 4, this chapter introduces more generally the objective and concepts behind minimum wage laws from an international law perspective. Based on the history and the relevant ILO Conventions and Recommendations, the chapter will consider the types of minimum wage systems that are in place, concerns that may arise regarding these systems, and alternative instruments that might compete with (or complement) minimum wages also aiming to mitigate inequality.

Special emphasis will be put on the previously mentioned important elements of the legal framework for minimum wages, namely: the universal coverage of the minimum wage; the periodic adjustment of the minimum wage; interaction with collective bargaining; and compliance.

2.2 Historical background

The roots of minimum wages date back until the end of the 20th century. In the 1890s, for the first time, minimum wage legislation was introduced in New Zealand and Australia to overcome a negotiation disparity between workers in sweatshops and their employers.⁷⁴ In 1919, the League of Nations established the ILO as a new international agency specializing on the amelioration of labour standards, the social protection of workers as well as job promotion.⁷⁵ At that time only a few countries had already introduced minimum wages for certain sectors.⁷⁶ Upon the proposal of the Paraguay delegation the issue of setting minimum wages was subject to a discussion on the 1927 session of the International Labour Conference resulting in the adoption of the Minimum Wage-Fixing Machinery Convention, 1928 (No.

⁷⁴ Charles Henry Verrill 'Minimum-wage Legislation in the United States and Foreign Countries' (1915) in Bulletin of the United States Bureau of Labor Statistics: Miscellaneous series (U.S. Government Printing Office, April 1915) 104.

⁷⁵ <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>, accessed on 7 February 2018.

⁷⁶ Among others, Australia, France, New Zealand, Norway and the United Kingdom had introduced minimum wages (Andrés Marinakis 'The role of the ILO in the development of minimum wages' ILO Working paper 2009 3).

26)⁷⁷, and Recommendation, 1928 (No. 30).⁷⁸ In Convention No 26, the Parties agreed to attempt to introduce minimum wages for certain areas of work ‘in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low’.⁷⁹ This convention established the first international comprehensive system regarding how and where to set minimum wages.

After the Second World War, the International Labour Conference adopted the ‘Declaration of Philadelphia’ explicitly clarifying that ‘poverty anywhere constitutes a danger to prosperity everywhere’ (Part I(c)) and recognizing that a minimum living wage can be an appropriate tool to ensure certain prosperity for all employed (Part III(d)).⁸⁰ Consequently, during the decades which followed, the Conference tried to promote minimum wage protection, particularly for sectors excluded from collective agreement coverage. The Minimum Wage Fixing Machinery Convention, 1951 (No. 99) focused on the agriculture sector but could also be applied to other areas in consultation with the social partners. In contrast to Convention No. 26, Convention No. 99 determined a stricter use of exemptions from statutory minimum wages. However, despite global economic growth, for many employees living conditions did not significantly improve, particularly in developing countries, where the poverty level remained high.⁸¹ As a result, the objective of social protection and the concept of minimum wages received increasing attention.⁸² Hence, in 1967, the ILO decided to review former conventions regarding minimum wages with special reference to developing countries. Concluding that none of the existing conventions provide criteria for the fixing of actual wages nor provisions for the periodical adjustment of minimum wages, the Parties discussed on the 53rd Session (1969) of the International Labour Conference the ‘minimum wage fixing machinery and related problems, with special reference to developing countries’ followed by the later adoption of the Convention No. 131 and the related Recommendation No. 135.⁸³

Still today, these key documents are taken into account if a country decides to design and implement a legal minimum wage framework. Moreover, the ILO has developed international

⁷⁷ The Minimum Wage-Fixing Machinery Convention, 1928 (No. 26) came into force on 14 June 1930 and has been ratified by 103 States (status as of 2014).

⁷⁸ ‘Minimum wage systems’ General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135) (International Labour Conference 103rd Session) 2.

⁷⁹ Article 1 of ILO Convention No. 26.

⁸⁰ Minimum wage systems op cit note 78 at 3.

⁸¹ Ibid at 31.

⁸² Ibid.

⁸³ Ibid at 6; The Minimum Wage Fixing Convention, 1970 (No. 131) came into force on 29 April 1972 and has been ratified by 52 States (status as of 2014).

standards set out in the ILO Constitution and various conventions.⁸⁴ Accordingly, basic principles like the freedom of collective bargaining, the equal remuneration for men and women workers for work of equal value, the elimination of any discrimination and the compliance with international labour standards are essential for the consideration of implementing a minimum wage.⁸⁵ As illustrated in the next section, the concept, fixing machinery and typical characteristics for minimum wages are based on ILO findings. After a period of stagnation between the mid-1980s until the early 2000s, the instrument of minimum wage policy again received increasing attention in response to large amounts of vulnerable employees as a product of global economic growth driven by globalization.⁸⁶ Since 2000, Convention No. 131 has been ratified by 11 new States and the Conference spared no effort to promote minimum wage policy by stating that minimum wages not only enhance living conditions but also improve the quality of work, increase demand and contribute to economic stability.⁸⁷ Additionally, the ILO provides technical assistance regarding implementation and operation of minimum wage policies and publishes ‘Global Wage Reports’.

2.3 Concept of minimum wages

ILO Convention No. 131 must be seen in combination with its accompanying ILO Minimum Wage Fixing Recommendation No. 135. They both not only underline the crucial aspects for implementing minimum wage legislation but also provide information on purpose and reasons for doing so.

Paragraph 1 of Recommendation No.135 specifies the purpose of introducing minimum wages. It points out that minimum wages should be seen as one instrument among others in a policy to effectively mitigate poverty by ensuring a certain level of protection for disadvantaged groups of wage earners. This protection is particularly needed for workers which earn very low wages because of market competition resulting to a ‘race to the bottom’.⁸⁸ In addition, the preamble sees minimum wages as an element contributing to economic growth and social

⁸⁴ An overview of the fundamental Conventions can be found at <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>, accessed on 7 February 2018.

⁸⁵ Minimum wage systems op cit note 78 at 8.

⁸⁶ Ibid at 9.

⁸⁷ Ibid at 10.

⁸⁸ Ibid at 32.

development such as the improvement of conditions for a fair competition between employers.⁸⁹

According to the ILO Committee the minimum wage may be defined as

‘the minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his or her family, in the light of national economic and social conditions’.⁹⁰

This definition sums up two main pillars of every minimum wage system. First, it states the major characteristic feature of a minimum wage - its binding nature, no matter how a certain minimum wage got fixed. Second, the definition highlights the importance of substantial social and economic aspects which need to be carefully considered while determining coverage, level and adjustments of the minimum wage. These two aspects can also be retrieved in Convention No. 131. Accordingly, article 2 emphasises the binding nature stating that minimum wages ‘shall have the force of law and shall not be subject to abatement’ whereas article 3 concludes the criteria for determining the specific level of minimum wages. Article 1 paragraph 1 of the Convention No. 131 determines one essential principle which marks an important innovation compared to former conventions. Claiming that every ratifying state shall establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate, Convention No. 131 determines the scope of application as broad as possible.⁹¹ In this context, paragraph 4 of Recommendation No. 135 substantiate the principle of universality specifying that

‘[t]he number and groups of wage earners who are not covered in pursuance of Article 1 of the Minimum Wage Fixing Convention, 1970, should be kept to a minimum.’

Paragraph 11 focuses on the important issue of adjusting existing minimum wages. Accordingly, to maintain a certain level of social protection for workers through minimum wages a periodical adjustment considering changes in living costs and other economic factors

⁸⁹ Ibid.

⁹⁰ ‘Report of the Committee of Experts on the Application of Conventions and Recommendations: Minimum wages Report III (Part 4B)’ (International Labour Conference, 79th Session, Geneva, 1992) para 42.

⁹¹ Minimum wage systems op cit note 78 at 30.

is needed. In that regard, article 1 paragraph 2 deals with the decision-making body. The provision makes clear that the competent authority shall only determine the groups of employees covered by minimum wages after full consultation with the social partners. As stated in article 4 paragraph 2 and 3, the social partners shall also be involved with regard to the minimum wage fixing machinery, which should be complemented by experts with recognized competence for representing a country's overall national interests.

Having in mind, the difficulty to achieve full compliance, article 5 claims national measures to ensure effective application and enforcement of the minimum legislation. More precisely, paragraph 14 of the Recommendation No. 135 sets up specific criteria for these measures, including the call for creating public awareness, simple and effective legal remedies for employees and adequate penalties in case of non-compliance.

2.4 Two approaches to a national minimum wage

There are to two different types of minimum wages. As concluded in paragraph 5(1) of Recommendation No. 135 there is either the possibility to fix one single minimum wage of general application or fixing a series of minimum wages applying to particular sectors or groups of employees.

Given that article 1 paragraph 1 claims a broad coverage to workers where minimum wages are appropriate, consequently the issue of exemptions arises. Accordingly, article 1 paragraph 3 indicates that exemptions should generally not be prohibited as long as they are necessary to prevent negative effects due to the application of minimum wages. The amount of exemptions depends not only on the national circumstances but also on the chosen type of minimum wage. Whereas series of minimum wages only apply to certain groups, there is less need of exemptions compared to an extensive NMW, which shall on principle apply to every employee. Moreover, paragraph 6 of Recommendation No. 135 provides various approaches to fix minimum wages. Thus, it becomes clear that countries should examine which fixing concept suits best to their domestic circumstances. Interestingly, the last form to fix minimum wages refers to the possibility to give force of law to provisions of collective agreements. Collective agreements constitute the essential instrument to rule wages and working conditions collectively. As legislation often incorporates provisions which allow to extend those agreements under certain requirements, one might argue that implementing a NMW is

dispensable. In order to examine the relationship, the next section will give a brief overview on collective bargaining and set it into context with minimum wages.

2.5 The minimum wage and collective bargaining

2.5.1 Definition and objective of collective bargaining

Based on a long history, collective bargaining established as a fundamental right at work and has become the major instrument to rule terms of employments collectively. To overcome the natural disparity between the employee, who regularly depends on his work as a basis for his existence and the employer, who naturally has an advantage in the negotiations concerning employment conditions, the idea was to transfer those negotiations onto a collective level. Aiming to ensure the basic needs for employees, experts on both sides should conclude agreements.

Article 2 of the ILO Collective Bargaining Convention, 1981 (No. 154) defines collective bargaining as a general term

‘to all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations’.

This definition includes the parties involved as well as the possible objects of negotiation. As an important ‘term of employment’, wages are often the most contentious subjects in collective negotiations and can be fixed through collective agreements.⁹² This is the reason why those collective wage agreements may be classified as competing instrument to statutory wages.

⁹² ‘Collective bargaining: a policy guide’ (International Labour Office, Governance and Tripartism Department, Conditions of Work and Equality Department - Geneva: ILO, 2015) 3.

2.5.2 Procedure

The procedure of collective bargaining does not follow a regular pattern. Negotiations can include various forms of discussions, either in a formal or an informal way, aiming to conclude an agreement which respects mutual interests.⁹³ Thus, the bargaining parties can agree on ad hoc arrangements or use formal institutional settings. To effectively achieve positive results, negotiations should always be conducted under the principle of good faith.

Collective bargaining intends that the parties involved conclude a collective agreement. The ILO highlights three important characteristics those agreements should fulfil: first, they should bind the signatories and those, on whose behalf they are concluded; second, the general application to every worker in a specific group, which is covered by the undertakings and its representatives; and third, the primacy over individual contractual employment agreements as long as these individual agreements are not more favourable to workers ('principle of favourability').⁹⁴

In practice, two models to incorporate collective bargaining into domestic statutory frameworks developed over time, trying to bear in mind domestic macroeconomic and political circumstances: the understanding of collective bargaining as an entirely voluntary process and the concept of a duty to bargain.⁹⁵ As there are numerous ways to shape a bargaining system, those systems can vary from a purely voluntarily non-state intervention approach to statutory frameworks regulating the bargaining process to different degrees.

2.5.3 Benefits

The major benefit of collective bargaining can be seen in its contribution to improvements in wages and working conditions, as well as equality.⁹⁶ Effective collective agreements are highly accepted by every party concerned as collective bargaining and their outcomes usually are based on a free and voluntary approach providing a sustainable working guideline. This can enhance respectful and productive labour relations between workers and their employer by avoiding costly labour disputes. Aiming mutual recognition, the outcome at best shall provide

⁹³ Ibid at 2.

⁹⁴ Ibid at 3.

⁹⁵ John Pencavel 'The Appropriate Design of Collective Bargaining Systems: Learning From the Experience of Britain, Australia and New Zealand' (1999) *Comparative Labor Law and Policy Journal* 466.

⁹⁶ Collective bargaining: a policy guide op cit note 92 at 4.

positive results for both sides – improving the job quality for workers and simultaneously facilitating productivity and enterprise performance.⁹⁷

2.5.4 Coverage and application

All these benefits of collective bargaining can only be enjoyed if the negotiation outcome effectively applies to a broad number of employers and their employees. However, in fact the coverage is one of the weaknesses of this policy instrument.

Generally, only the police and army are excluded from the general right to collective bargaining.⁹⁸ Every other employee is free to join or establish a trade union in order to express his claims collectively. Being a trade union member entitles an employee to benefit from the outcome negotiated by experts on their behalf. Consequently, employees who do not join a trade union are not able to claim these benefits as they are not covered by collective agreements. However, during the last decades the definition of employee and dependent work have become blurred.⁹⁹ Given that only employees who engage in dependent work can be covered by collective agreements, it is often contentious if workers can be classified as independent contractors. Contractual arrangements may undermine collective bargaining if workers are characterized as independent contractors while in fact find themselves in a disguised employment relationship.¹⁰⁰ As a result, especially in countries with weak statutory worker protection a significant amount of labour force cannot fully assert their right to collective bargaining.¹⁰¹

Nevertheless, collective bargaining remains an important tool to set certain levels of wages. Article 2 (2) of Convention No. 131 recognizes the freedom of collective bargaining and thus respects this policy approach as an accompanying tool to fix wages. Collective bargaining is possible on enterprise, sectoral or even national level. Besides, its outcomes may not only be binding to the signatories and those they represent but can also obtain general applicability through an extension authorized by an authority under certain legal requirements. According to paragraph 5(1) and (2) of the Collective Agreements Recommendation, 1951 (No. 91), the extension of an agreement must be requested by at least one negotiating party. Moreover, those who would fall under the general applicability should be included in the progress. The granting

⁹⁷ Ibid at 5, 6.

⁹⁸ Ibid at 29.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

of extensions usually depends on the existence of public interest considerations.¹⁰² Hence, the question arises, if minimum wage levels can be classified as an important public interest with the consequence that they therefore should be better incorporated in a collective bargaining framework. The following Chapters will revive this contentious question show that it can be answered differently depending on national circumstances.

2.6 Concerns

As implied above, fixing minimum wages has not only proponents. Whereas there is consensus regarding the intention to improve the overall living and working conditions of workers, experts argue about the appropriate means. Concerning the issue of minimum wages, there are concerns on various levels. Economically and politically, there is disagreement whether the implementation of a NMW is the right policy approach as it might have negative impacts on job growth and employment.¹⁰³ Theoretically, employment effects may either be evaluated as negative, positive or even neutral depending which labour market theory one favours.¹⁰⁴ However, existing international empirical evidence allow different conclusions.¹⁰⁵ Moreover, scholars, economists and policymaker argue over the appropriate type, level, fixing machinery and application of a minimum wage. As explicitly mentioned by the International Organisation of Employers (IOE), critics fear several negative repercussions, including: decreasing labour market experience; less on-the-job training; reduced productivity; as well as decelerated enterprise creation and growth.¹⁰⁶ In addition, other means like the expansion of the social welfare systems are debated as more effective alternatives to a minimum wage.¹⁰⁷ Nevertheless, the big remaining question focuses on possible job loss and its potential magnitude.

¹⁰² Ibid at 70.

¹⁰³ Jonathan Meer & Jeremy West 'Effects of the Minimum Wage on Employment Dynamics' *NBER Working Paper No. 19262* (January 2015) 1, 22.

¹⁰⁴ Ibid.

¹⁰⁵ Oliver Bruttel, Arne Baumann & Matthias Dütsch 'The new German statutory minimum wage in comparative perspective: Employment effects and other adjustment channels' *European Journal of Industrial Relations* (2017) 3.

¹⁰⁶ Minimum wage systems op cit note 78 at 32.

¹⁰⁷ Ibid.

2.7 Conclusion

Establishing a minimum wage framework is not a new policy approach. For a long time, the ILO acknowledged minimum wages and many countries already use this instrument aiming to mitigate wage and social inequality. However, it remains contentious if, when and how minimum wages can facilitate economic growth and social justice without having drastic negative side effects on the economy and the labour market. As social norms and economic circumstances may differ in every country, it is without doubt that a minimum wage system must be carefully adjusted to them in order to prevent negative repercussions as far as possible.¹⁰⁸ In the following chapter, it will be examined and assessed whether the German minimum legislation is carefully designed in light of its socio-economic environment and the ILO's guidelines.

¹⁰⁸ Wendy V. Cunningham 'Minimum Wages and Social Policy: Lessons from Developing Countries' (2007, The World Bank) 70.

3. THE GERMAN MINIMUM WAGE ACT

3.1 Debate and implementation

Although the instrument of a mandatory minimum wage is in place in many jurisdictions, likely impacts and legal implementation are still highly contentious topics. In January 2015, the German NMW came into force after a long and intense national debate lasting over 10 years.¹⁰⁹ In order to comprehend the legal framework of the Minimum Wage Act, its provisions must be set within context the German wage-setting mechanism and labour market.

3.1.1 German labour market and wage-setting system

Germany always followed a rather voluntary collective bargaining approach. Employers or employers' organisations negotiated with representative trade unions to conclude collective agreements over working conditions and wages either on enterprise or sectoral level.¹¹⁰ As collective bargaining usually takes place on sectoral level without any direct state intervention, the German system can be described as 'autonomous'.¹¹¹ The state only gets involved in the wage-setting process if the social partners decide to apply for a general application of a collective agreement. However, it can be seen that generally binding collective pay agreements constantly run after their actual purpose to cover sectors with weak trade union activity. In practice, these agreements exist only to a small extend in industries consisting of small and medium-sized enterprises, where trade unions traditionally do not have strong bargaining power due to a lack of codetermination.¹¹²

Whereas until the mid-1990s, German employees enjoyed a broad coverage of collective agreements of about 85 percent, in the following time, employers' willingness to further on comply with collective agreements started to diminish.¹¹³ In 2013, the coverage of collective agreements fell to only 60 percent in Western Germany and 48 percent in Eastern Germany.¹¹⁴ Several factors impinged that development and increased the low-wage sector.

¹⁰⁹ Gerhard Bosch 'The bumpy road to a National Minimum Wage in Germany' (2015) 3.

¹¹⁰ Annelie Marquardt 'Collective Agreements' (XIVth Meeting of European Labour Court Judges 4 September 2006 Cour de cassation Paris) 5.

¹¹¹ Bosch op cit note 109 at 4.

¹¹² Ibid at 5, 6.

¹¹³ Ibid at 6.

¹¹⁴ https://www.boeckler.de/wsi-tarifarchiv_2257.htm, accessed on 7 February 2018.

First to mention are the changing corporate strategies, which can be seen as a result to the historical events of the reunification of Germany and the rising global market. To challenge new competitors not only domestically but also globally, enterprises searched for new ways to cut wage cost.¹¹⁵ Consequently, production was partly relocated in foreign countries and many jobs were outsourced to avoid coverage by collective agreements. In addition, many public services were opened to private operators which were not bound by collective agreements to a large extent.¹¹⁶ Because of that development, employees often work together under one roof, albeit they do not have the same employer. As a result, wages more often are not set by collective agreements any more, but rather are subject to individual provisions.¹¹⁷

The development outlined above got even bolstered by labour reforms in 2003 facilitating temporary agency employment and ‘mini jobs’ with a maximal monthly salary of EUR 450.¹¹⁸ As a response to five million unemployed people, these reforms intended to give rise to the low-wage sector. Many employers decided to hire mini-jobbers for economic reasons as these workers – in contrast to part-time workers - do not enjoy social security contributions. As a result, trade unions lost power because most mini-jobbers were, and still are not organised and difficult to reach.¹¹⁹ This development continued and led to a large low-wage sector with little coverage by collective agreements.

In addition, as mentioned in Chapter 1, mutual agreements between unions and management (particularly in the export industry) limited wage increase compared to other European countries.¹²⁰

Today, there are different factors which determine the wage of an employee. The most important source is of course the employment contract between the employer and the employee.¹²¹ Individually, they can agree on a certain salary. Furthermore, a collective agreement may apply to the employment relationship. This can either be because of mutual membership to the bargaining parties¹²², individual agreement¹²³ or due to the fact that a

¹¹⁵ Bosch op cit note 109 at 9, 10.

¹¹⁶ Ibid at 10.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Cermak op cit note 50.

¹²¹ See section 611(1) German Civil Code (BGB).

¹²² See section 3(1) Collective Agreements Act (TVG).

¹²³ Employer and employee can individually add a reference clause to the employment agreement.

collective agreement has been declared as generally binding.¹²⁴ Finally, since 2015, the statutory minimum wage generally applies with certain exemptions as an absolute wage floor for every employee.

3.1.2 Low-wage sector

According to data from the German Government, the low-wage sector makes up 21.4 percent of the total workforce.¹²⁵ Statisticians classify a wage as low-wage if it amounts to less than two thirds under the median-wage of all employed people.¹²⁶ It is conspicuous that among the low-wage earners, most are employed atypically. Over 40 percent of the atypical worker earn low-wages, in particular short-time and temporary workers, but also workers with fixed-term employment contracts and mini-jobbers.¹²⁷ One may assume that, education and qualification does not automatically protect people from earning low wages. In fact, in 2013, two third of the low wage earners had completed a vocational training, over ten percent had even attained a higher education degree.¹²⁸ Nevertheless, the better the qualification, the less likely it is to work for low wages. Whereas only 24.3 of the people with a vocational training earn low wages, nearly 44 percent of the non-qualified people work in the low-wage sector.¹²⁹ In addition, it is mentionable that women make up a significant share of the low-wage earners. Nearly one third of all employed women earn low-wages. Regarding the age of low-wage earners one can conclude that low-wages are becoming a big challenge for young people. Although nearly 50 percent of the low-wage earners are older than 45 years, over 50 percent of the employees under 25 earn low wages.¹³⁰

3.1.3 Recitals for the implementation of a national minimum wage

As indicated above, extensive deregulation on the German labour market, cuts in transfer payments as well as more stringent rules, forced long-term unemployed people to accept job

¹²⁴ There are two legal possibilities to achieve a universal application: the declaration of general applicability of collective agreements under the requirements of section 5 TVG and the general applicability for foreign employers under the legal statutes of the Posted Workers Act (AEntG). These binding collective agreements can be referred to as ‘industry specific minimum wages’ (Ibid).

¹²⁵ <http://www.dgb.de/themen/++co++4c4fccfc-737a-11e7-b9d0-525400e5a74a>, accessed on 7 February 2018.

¹²⁶ <https://data.oecd.org/earnwage/wage-levels.htm>, accessed on 7 February 2018.

¹²⁷ <http://www.dgb.de/themen/++co++4c4fccfc-737a-11e7-b9d0-525400e5a74a>, accessed on 7 February 2018.

¹²⁸ Thorsten Kalina & Claudia Weinkopf ‘Niedriglohnbeschäftigung 2013: Stagnation auf hohem Niveau’ *IAQ-Report 03/2015* (2015) 4.

¹²⁹ Ibid.

¹³⁰ Ibid at 5.

offers which led to a massive increase of low paid workers. According to the researchers of the Institute of Economic and Social Research (WSI), the strict conditionality of access to transfer payments (commonly known as ‘the workfare approach’) only lead a broad exchange of poor unemployed people to poor workers.¹³¹ These findings were shared by several unions. Accompanied by their continuing loss of membership due to the outsourcing of operations to temporary work agencies or subcontractors, which are not bound by collective agreements and the recognition that bargaining adequate wages has become very tough in several industries, in 2006, the German Trade Union Confederation agreed to campaign for a NMW.¹³²

Nevertheless, this undertaking was initially not politically supported by the left-winged government, which intended to push pay downwards at the lower end of the wage distribution in order to mitigate the high unemployment rate.¹³³ However, in light of the growing overall popularity of the idea to introduce a minimum wage and the positive economic situation, the political climate shifted towards a more minimum wage friendly sentiment.¹³⁴ Due to warnings of domestic economic research institutes, which amplified the fears of dramatic job losses especially in Eastern Germany and the unforeseen financial crisis, instead of directly introducing a NMW the German government decided to establish several industry-level minimum wages by using the instrument of declaring existing collective agreements as generally binding, which is provided by the Posted Workers Act.¹³⁵ Although employer’s associations opposed a minimum wage, the left political camp agreed to make the demand for a minimum wage a core issue for the 2013 elections. The reasons for this decision include the fact that so far, no negative impacts linked to industry-level minimum wages did occur and trade unions significantly increased pressure on their natural political allies.¹³⁶ As an outcome of the new formed government, the new Minimum Wage Act was part of a large legislative package titled ‘Act on the Strengthening of Free Collective Bargaining’. Thereby, trade unions succeeded with their demand to link the introduction of a NMW with a general strengthening of free collective bargaining, including the possibility to establish industry-level minimum wages in all industries and to declare collective agreements as generally binding in case of a ‘public interest’.¹³⁷

¹³¹ Spannagel et al op cit note 64 at 1.

¹³² Bosch op cit note 109 at 10.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Section 5(1) TVG.

3.2 Scope and exemptions

The statutory minimum wage amounting EUR 8.50 has nearly universal coverage as it applies to every employee, including interns.

Nevertheless, in accordance with the MiLoG, particular groups of employees are excluded from the personal scope of the act. Accordingly, section 22 MiLoG stipulates the following:

‘(1) This Act applies to workers. Interns within the meaning of section 26 of the Vocational Training Act [...] shall be regarded as workers within the meaning of this Act, unless they are doing

1. an internship which is mandatory pursuant to a provision under education law in respect of schools, vocational training regulations, a provision under education law in respect of tertiary education or as part of vocational training at a vocational academy regulated by law,
2. an internship of no more than three months as a period of vocational orientation or prior to commencing a higher education course,
3. an internship of no more than three months which accompanies vocational training or tertiary education, unless such an internship relationship existed with the same trainee prior thereto, or
4. introductory training in accordance with section 54a of the Third Book of the Social Code [...] or preparation for vocational training in accordance with sections 68 to 70 of the Vocational Training Act.

[...]

(2) Those persons referred to in section 2 (1) and (2) of the Youth Employment Protection Act [...] who have not completed any vocational training shall not be regarded as workers within the meaning of this Act.

(3) [...]

(4) In the first six months of their employment the minimum wage shall not apply to the employment relationships of workers who were classed as long-term unemployed within the meaning of section 18 (1) of the Third Book of the Social Code immediately prior to beginning their employment. [...]

Persuant to the principle of favourability, section 1 (3) MiLoG clarifies that industry-specific minimum wages established under the framework of the Posted Workers Act or the Act on Temporary Employment Businesses (AÜG) only prevail to the statutory minimum wage in case they are set higher.

3.3 Adjusting the level

3.3.1 The minimum wage commission

Whereas the initial level of the statutory minimum wage was determined by legislation, subsequent adjustments are to be determined by the social partners. In this regard, the Act makes provision for a minimum wage commission to review and – if necessary – adjust the present level.¹³⁸ The commission comprises of six voting employer and trade union representatives (three each), a voting chair and two non-voting (advisory) members, selected from among the scientific community.¹³⁹ As with effect from 1 January 2017, the minimum wage commission decided to increase the minimum wage from EUR 8.50 to EUR 8.84. According to section 9(1) MiLoG, the minimum wage commission must decide over further adjustments every two years, starting from 2017.

3.3.2 Process of adjusting minimum wages

During the process of adjusting, the minimum wage commission acts autonomously and is bound only by the requirements set by law.¹⁴⁰ The process of examining whether and which adjustment of the minimum wage level is necessary includes the consultation of external scientific experts, employer and employee associations as well as other associations, which promote economic and social interests. In essence, the minimum wage commission has to evaluate which level would help to maintain appropriate minimum protection for workers, facilitate fair conditions for functioning competition and, at the same time, not jeopardise jobs. By doing so, the assessment must consider the development of collectively bargained pay scales in Germany.¹⁴¹

Finally, the federal government is entitled to give legal force to the resolution provided by the commission after giving the relevant associations affected by the adjustment the possibility to comment.¹⁴²

¹³⁸ Section 4-10 MiLoG.

¹³⁹ Section 4 MiLoG.

¹⁴⁰ 'The Minimum Wage Act in detail: Objectives, application, implementation and control' (Federal Ministry of Labour and Social Affairs) 42.

¹⁴¹ Section 9 (2) MiLoG.

¹⁴² Section 11 (2) MiLoG.

3.4 Monitoring and compliance

To ensure compliance with the employers' obligation to pay the statutory minimum wage, the act incorporates a framework to monitor and if necessary enforce compliance.

Generally, there are three major sources of information concerning non-compliance: firstly, the results from monitoring and enforcement activities; secondly, the conclusion drawn from the data about wages beneath the minimum wage; and lastly evidence arising from qualitative research.¹⁴³

According to the MiLoG, the Financial Monitoring Unit for Illicit Employment (Finanzkontrolle Schwarzarbeit – FKS), a special unit within the Customs Authority (Generalzolldirektion), is responsible to monitor compliance with the act and to enforce the law on illegal employment.¹⁴⁴ The controls are part of the conducted employer inspections and do concentrate particularly on the shadow economy.¹⁴⁵

3.5 Impacts

There is agreement on the fact that a statutory minimum wage may have various impacts on the labour market, a country's economy and working conditions. In the following, the most controversial and far-reaching effects of the German minimum wage will be presented.

3.5.1 Employment effects

Like in many other countries, even before the introduction and entry into force of the NMW, the fear of negative impacts on domestic employment gave rise to an intense debate among economists.

As during the drafting of the 2016 Minimum Wage Report not enough reliable data was available, the report is not qualified for presenting an accurate picture on employment effects.¹⁴⁶ While evaluating employment effects through a statutory wage floor, researchers

¹⁴³ Bruttel et al op cit note 105 at 13.

¹⁴⁴ 'Erster Bericht zu den Auswirkungen des gesetzlichen Mindestlohns: Bericht der Mindestlohnkommission an die Bundesregierung nach § 9 Abs. 4 Mindestlohngesetz' (Mindestlohnkommission 2016) 62.

¹⁴⁵ Bruttel et al op cit note 105 at 13.

¹⁴⁶ Mindestlohnkommission op cit 144 at 75.

always have to bear in mind that besides the possible effects of the minimum wage, the economic circle, the demographic development as well as the technological change may influence the labour market and therefore must be taken into consideration. Therefore, to isolate minimum wage effects from other macroeconomic developments, researchers try to assess these effects by analysing regional and industry-specific data.¹⁴⁷ Based on the data of the Federal Employment Agency (BA) which is also available regionally, a first serious assessment on employment effects was conducted.¹⁴⁸

As a result by mid-2017, the introduction of the statutory minimum wage did not contribute to adverse employment trends nor led to proven negative effect on unemployment.¹⁴⁹ Moreover, the more a state or an industry was effected by the minimum wage, the stronger the increase in employment subject to social security deductions was. It is argued that the reason for this lay in the fact that numerous minijobs were transformed into employment subject to social security deductions.¹⁵⁰ Contrary to the proponents concerns, the minimum wage may only be responsible for slight reduction in hires. Nevertheless, as enterprises apparently prefer to use non-employment adjustment channels like work intensity, selling prices or deferment of investments to adapt increased labour costs, mentionable negative employment effects cannot be detected.¹⁵¹ As examined by these researches, only a minority of enterprises considered such measures.

3.5.2 Wage effects and low-wage sector

The introduction of the minimum wage is often also described as a fairness issue. Low-paid workers should no longer work poor. Instead, the wage floor should maintain a wage level which ensures a certain way of participation in society.¹⁵²

¹⁴⁷ Alfred Garloff 'Der Mindestlohn ist kein Jobkiller' *IAB Forum* (2017) 3.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid at 5.

¹⁵⁰ Ibid at 4; Ronald Janssen 'The German Minimum Wage Is Not A Job Killer' *Social Europe* 9 September 2015, available at <https://www.socialeurope.eu/the-german-minimum-wage-is-not-a-job-killer>, accessed on 7 February 2018.

¹⁵¹ Mario Bossler & Hans-Dieter Gerner 'Employment effects of the new German minimum wage: Evidence from establishment-level micro data' (2016) *IAB-Discussion Paper 10/2016* 4; although results vary throughout studies, they are mostly well below the predictions of 500,000 to 900,000 job losses (Marco Caliendo, Alexandra Fedorets, Malte Preuss, Carsten Schröder & Linda Wittbrodt 'The Short-Run Employment Effects of the German Minimum Wage Reform' (2017) *IZA DP No. 11190* 24).

¹⁵² BMAS 'National Minimum Wage Bill' (2015) 33, available at https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Pressemitteilungen/2014/2013-04-02-gesetzentwurf-tarifpaket-mindestlohn.pdf?__blob=publicationFile, accessed on 7 February 2018.

Although some of the enterprises effected by the new minimum wage legislation reduced recruitment, since 2015, the minimum wage led to a considerable wage increase for the relevant employees: their gross monthly earnings increased in average about twelve percent.¹⁵³ Particularly in Eastern Germany the minimum wage boosted earnings, especially for the low-skilled workers, and those in atypical employment (e.g. mini-jobs, part-time work).¹⁵⁴ However, the goal to significantly reduce the low-wage sector has not been achieved so far, which researchers partly attribute to the fact that the threshold of low-pay has sharply increased in Germany and is regularly beneath the minimum wage level.¹⁵⁵

3.5.3 Economic effects

On a macroeconomic basis, there is too little data so far to seriously determine clear effects of the NMW on employment costs, productivity and unit labour cost.¹⁵⁶ In specific sectors, prices increased above average.¹⁵⁷ However, these increases did not affect demand negatively.¹⁵⁸ Regarding the development of market entries, the NMW had no negative impacts so far.¹⁵⁹ Moreover, marginal employment was largely transformed into regular employment, which leads to positive effects on the welfare of workers and the social security system.¹⁶⁰ Nonetheless, negative side effects of the minimum wage may show up later as the German economy was performing strongly at the time the NMW was introduced.¹⁶¹ In 2015, the migrant crisis hit Germany strongly and still, a high number of low-skilled refugees is likely to enter the German labour market. Consequently, in future, wages of low-skilled employees could be negatively affected and fall.¹⁶² As the NMW would limit this decline, an adjustment of the minimum wage level should be considered to prevent increasing unemployment in this

¹⁵³ Bossler & Gerner op cit note 151 at 3; In 2014, nearly 12 percent of the employees in Germany earned hourly wages beneath the minimum wage of EUR 8.50 (data: IAQ-Report 06/2017).

¹⁵⁴ European Commission Report, Country Report Germany 2016, 72.

¹⁵⁵ Thorsten Kalina & Claudia Weinkopf 'Niedriglohnbeschäftigung 2015 – bislang kein Rückgang im Zuge der Mindestlohnneinführung' *IAQ-Report 06/2017* (2017) 14.

¹⁵⁶ Mindestlohnkommission op cit 144 at 118.

¹⁵⁷ Ibid at 118, 119.

¹⁵⁸ Hagen Lesch 'Ein Jahr gesetzlicher Mindestlohn: Auswirkungen auf Beschäftigung, Preise und Lohnstruktur' *DIW Köln IW-Report 20/2016* 19.

¹⁵⁹ Mindestlohnkommission op cit 144 at 121.

¹⁶⁰ Alfred Garloff 'Side effects of the new German minimum wage on (un-)employment: First evidence from regional data' (2016) *IAB Discussion Paper 31/2016* 26.

¹⁶¹ Bruttel et al op cit note 105 at 15.

¹⁶² Lesch op cit note 158 at 20.

group.¹⁶³ Otherwise, people willing to work would try to undermine the minimum wage which would lead an increase of bogus self-employment and undeclared work.¹⁶⁴

3.5.4 Compliance

The minimum wage can only be a successful tool if the employers comply with their obligation to respect the statutory wage floor. Therefore, in 2015, over 43,000 employers were monitored with a result of only 705 preliminary proceedings being initiated due to non-compliance with minimum wage obligations.¹⁶⁵ However, trade unions were dissatisfied as they criticized inadequate monitoring of employers in low-wage sectors.¹⁶⁶

Depending on survey data, a mixed picture can be drawn. Accordingly, in mid-2015 between three to four percent of all employees were still paid inadequately; among marginal part-time employees some data recognise a very high percentage of non-compliance of nearly 50 percent, whereas other data only estimates thirteen percent.¹⁶⁷ Taking into account the legal exemptions and measurement inaccuracies, one must admit that it is very sophisticated to estimate the exact extent of non-compliance. However, according to a new and serious study conducted by the independent German Institute for Economic Research (DIW Berlin), around 1.8 million entitled persons earned less than the statutory minimum wage in the first half of 2016.¹⁶⁸

3.6 Provisional evaluation

The introduction of the minimum wage in Germany can only be assessed in context with its legislative package. So far, the MiLoG proved itself not as a bureaucratic monster as some prognosticated; nevertheless, many employers still complained about additional accounting work.¹⁶⁹ No indications on negative impacts on employment or economy were found, moreover

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Mindestlohnkommission op cit 144 at 33.

¹⁶⁶ Ibid.

¹⁶⁷ Bruttel et al op cit note 105 at 14.

¹⁶⁸ Patrick Burael, Marco Caliendo, Alexandra Fedorets, Markus M. Grabka, Carsten Schröder, Jürgen Schupp & Linda Wittbrodt 'Minimum wage not yet for everyone: on the compensation of eligible workers before and after the minimum wage reform from the perspective of employees' *DIW Economic Bulletin* 49.2017 513, 514 (These numbers refer to workers with *contractual* hourly wages lower than the minimum wage. On a basis of *actual* working time, the estimated number of entitled persons earning less than the statutory minimum wage amounts 2.6 million in 2016 and 2.8 million in 2015).

¹⁶⁹ 'Gesetzlicher Mindestlohn führt zu mehr Bürokratie und Rechtsunsicherheit und bleibt nicht ohne negative Folgen für Beschäftigung' *BDA Statement* (28 June 2016) 5.

a significant number of workers are at least entitled to claim higher earnings and had an actual wage increase.¹⁷⁰ Although in 2016 an estimated number of 1.8 million earned less than the minimum wage, the rate of entitled persons earning too little declined more than one percent compared to 2015.¹⁷¹ However, they still make up seven percent of all entitled persons.¹⁷²

Although a wave of redundancies did not come up, other adjustment channels may lead to a certain increase of stress for employees. In addition, the low-wage sector did not decline substantially; plus - particularly in the services sector - prices for consumers increased. The latter, in turn, to a certain extent may be compensated through an additional gain in purchasing power due to the minimum wage.¹⁷³

¹⁷⁰ Marc Amlinger, Reinhard Bispinck & Thorsten Schulten 'The German Minimum Wage: Experiences and Perspectives after One Year' (2016) *WSI-Report No. 28e 1/2016* 14; Burauel et al op cit note 168 at 509.

¹⁷¹ Burauel et al op cit note 168 at 513.

¹⁷² Ibid.

¹⁷³ Ibid.

4. THE NATIONAL MINIMUM WAGE IN SOUTH AFRICA

4.1 Introduction

Fulfilling the ‘Agreement on the Introduction of a National Minimum Wage’ and considering the ‘Recommendations on Policy and Implementation’ to the Deputy President by the National Minimum Wage Panel, the Department of Labour published the (National Minimum Wage) Bill in November 2017 accompanied by the Basic Conditions of Employment Amendment Bill.¹⁷⁴

This chapter does not only present the Bill itself but also the existing wage-setting mechanism in South Africa to draw a complete picture of the future wage legislation.

4.2 Existing wage-setting mechanisms

At present, wages are set in South Africa collectively, either on a sectoral basis through collective agreements or through sectoral determinations.

Collective bargaining can take place at plant or on sectoral level. The idea of the Labour Relations Act 66 of 1995 (LRA) was to especially promote centralized bargaining as a tool to guarantee fair working conditions and wages. Therefore, the drafters concentrated on bargaining at sectoral level within the framework of bargaining councils or statutory councils.¹⁷⁵ Furthermore, the LRA provides the possibility to extend bargaining council agreements to non-parties if certain legal requirements are met.¹⁷⁶

According to the rules of the Basic Conditions of Employment Act (BCEA), sectoral determinations can be established on the recommendation of the Employment Conditions Commission (ECC) if there is no collective agreement coverage, this is because low levels of organisation and workers are deemed especially vulnerable to exploitation. The commissioners must act independently and shall not act as a representative of their constituencies.¹⁷⁷ In 2014,

¹⁷⁴ Published in Government Gazette No. 41257 of 17 November 2017.

¹⁷⁵ John Grogan, *Collective Labour Law* 2 ed (2014) 97.

¹⁷⁶ Section 32 LRA.

¹⁷⁷ Ruth Castel-Branco ‘Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa’ (Wits University 2016) 3.

South Africa had 124 sectoral determinations amounting to the highest number of minimum wages in Africa.¹⁷⁸

Obviously, wages can also be negotiated individually, but nonetheless collective agreements supersede contracts of employment. Accordingly, the LRA clarifies that contracts of employment may not permit a worker less favourable wages than those prescribed by collective agreements.¹⁷⁹ The same consequently applies to sectoral determinations.

4.3 Objectives

As indicated by its name, the minimum wage intends to set a wage floor for employees. Nonetheless, as pointed out by former President Zuma, the main purpose of introducing a minimum wage was predominantly to mitigate the unequal wage structure in South Africa.¹⁸⁰ As mentioned in Chapter 2, 60 percent of the total earnings belong to the top 20 percent of the wage earners whereas the bottom 60 percent only earn 20 percent of the total earnings. Additionally, in South Africa over 50 percent of the full-time workers are ‘working poor’, unable to bring themselves and their dependants out of poverty.¹⁸¹ Having in mind these circumstances, the minimum wage shall contribute to a change of the wage structure by increasing the earnings of the working poor and raising the labour share.¹⁸² Section 2 of the Bill summarizes the ultimate purpose of the Act: the acceleration of economic development and the improvement of social justice. Moreover, these overall goals are also reflected in section 7(a)(ii) and (iii) of the Bill, which rules the issues the National Minimum Wage Commission (hereinafter referred to as ‘the Commission’) shall bear in mind while conducting its annual review and recommending adjustments of the minimum wage.

4.4 Scope and exemptions

According to section 3 of the Bill, the statutory minimum wage shall apply

¹⁷⁸ Castel-Branco op cit note 177 at iv.

¹⁷⁹ Grogan op cit note 175 at 168.

¹⁸⁰ Castel-Branco op cit note 177 at iv.

¹⁸¹ Ibid at 1.

¹⁸² Ibid.

‘to all workers and their employers except members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.’

As clarified in section 4(4) of the Bill

‘payment of a national minimum wage cannot be waived and the national minimum wage takes precedence over any contrary provision in any contract, collective agreement or law, except a law amending this Act’.

This broad coverage is accompanied by the possibility to apply for an exemption, stipulated in section 15 of the Bill. Unlike the German MiLoG, the Bill does not contain explicit exemptions but rather a general exemption mechanism, which entitles an employer or a registered employers’ organisation to apply for an exemption in case the requirements stated in section 15(2) are met. It is striking that the Bill does not set up substantive criteria for granting exemptions. Applicants must only meet formal requirements, before the Minister of Labour (MoL) decides upon the application. However, according to section 16 of the Bill, the MoL may enact certain regulations alongside, including the ‘criteria that must be applied when evaluating exemption applications’.

Concerning the components of the minimum wage section 5(1) of the Bill describes the remuneration as

‘amount payable in money for ordinary hours of work excluding-

- (a) any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance;
- (b) any payment in kind including board or accommodation;
- (c) gratuities including bonuses, tips or gifts; and
- (d) any other prescribed category of payment.’¹⁸³

In other words, the remuneration making up the minimum wage is paid for productivity and performance. Unlike some sectors, which are covered by collective agreements or sectoral determinations, premium payments and in-kind benefits are always excluded.

¹⁸³ Section 1 of the Bill defines *ordinary hours of work* as ‘the hours of work permitted in terms of section 9 of the BCEA Act or in terms of any agreement in terms of section 11 or 12 of the BCEA’.

4.5 Adjustments

Section 6 of the Bill sets up the procedure for an annual review of the minimum wage level and possible adjustments to the initial level, stipulated in Schedule 1. In contrast to the German MiLoG, the South African Bill does not focus on explicit exemptions but rather follows the idea of a tiered minimum wage level considering special vulnerable groups of workers. Accordingly, section 2 of Schedule 1 of the Bill determines different minimum wages for farm workers, domestic workers, workers employed on an expanded public works programme and workers who have concluded learnership agreements.

In accordance with ILO Convention No. 131, which makes regular adjustments of the minimum wage level compulsory, the Bill incorporates a legal framework thereto. Like Germany, instead of an automatic increase of wages, South Africa decided to implement an individual and flexible mechanism. As stated in section 6(1) and section 11(1), the Commission must regularly conduct a minimum wage review and provide recommendations for adjusting the level. Similar to the content of section 54(3) of the BCEA, section 7 of the Bill provides a non-exhaustible list of criteria, which the Commission must take into consideration during the process of drafting adjustment recommendations. These criteria include cost of living indicators, labour market indicators, economic circumstances and employers' interests.

Whereas chapter 3 of the Bill concerns the composition of the Commission and the selection of its members, ensuring the participation of all social partners, section 6 of the Bill rules the process of implementing adjustments. Thus, after having agreed on a specific recommendation, the Commission must forward it accompanied by its review to the Minister. In case the Minister agrees on the implementation of the recommendation, he must submit it to the Cabinet for approval. Finally, if also the Cabinet gives approval, the National Assembly must decide to not make use of its right to pass a contrary resolution in time before the amended schedules can take effect.

4.6 Compliance and enforcement

4.6.1 Compulsory compliance

The Bill does not contain provisions regarding the compliance and enforcement procedure of the new minimum wage legislation. However, the LRA and the BCEA provide a legal framework to protect and enforce workers' rights. Protection against unfair labour practices is covered by the LRA, whereas the BCEA regulates and if necessary enforces the basic conditions of employment, including minimum wages. Accordingly, chapter 10 of the BCEA gives labour inspectors the right to enter workplaces to monitor and enforce compliance with labour laws and enact relevant orders to respond to wage violations. Moreover, the ECC is responsible to monitor compliance by obligating employers to keep employment records and provide copies for inspection and employees on request.¹⁸⁴

Section 4(6) of the Bill indicates that altering 'wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage' constitute an unfair labour practice. Consequently, legal protection under the provisions of the LRA do apply in this matter.

4.6.2 Voluntary compliance

To minimize the conduct of enforcement measures, incentives to strengthen voluntary compliance also play an important role.¹⁸⁵ Currently, South Africa has no unified measures for incentivising compliance with sectoral determinations, albeit for some industries certain incentives have been implemented.¹⁸⁶ The National Textile Bargaining Council (NTBC) or the National Bargaining Council for the Clothing and Manufacturing Industry (NBCCMI) annually for example provide certificates to enterprises who demonstrated compliance with labour standards.¹⁸⁷ These certificates entitle employers to apply for loans at the Industrial Development Corporation (IDC) and qualify for rebates on import duties.¹⁸⁸ Furthermore,

¹⁸⁴ Castel-Branco op cit note 177 at 27.

¹⁸⁵ Ibid at 24.

¹⁸⁶ Elena Konopelko 'Incentives to Enhance Compliance with a NMW in South Africa' *Policy Brief#5* (Wits University 2016) 1.

¹⁸⁷ Castel-Branco op cit note 177 at 24.

¹⁸⁸ Ibid.

compliance certificates are needed to apply for the Department of Trade and Industry's Production Incentive (PI) and Competitive Improvement Programme (CIP).¹⁸⁹

4.7 Conclusion

The new minimum wage legislation as stipulated in the Bill complements the existing sectoral minimum wages in South Africa. It incorporates a system of reviewing and adjusting the level of the minimum wage by establishing a minimum wage commission. The social partners are represented and get support by research scientists. Policy recommendations have broadly been considered as the essential components like exclusions and exemptions, reference periods or compliance measures attracted attention while drafting the Bill. However, the question arises, if the Bill has adequately taken domestic circumstances into consideration and therefore may achieve its objectives. This final assessment will be carried out in the following chapter.

¹⁸⁹ Ibid.

5. ASSESSMENT OF THE PROPOSED BILL

Although the Bill contains a wide-ranging legal framework to introduce a statutory minimum wage in South Africa, it is not as comprehensive as the German Minimum Wage Act. This chapter assesses the Bill by analysing probable impacts on employment, economy and social structure. Particularly, the presumable effectiveness of the legal possibilities will be evaluated by comparing the provisions of the Bill to those from its German counterpart. Always bearing in mind the different economic and social differences it will be shown that – despite some reasonable concerns – a new minimum wage act based on the Bill may indeed contribute to some of its goals. However, the findings indicate that the Bill could benefit from minor amendments and incorporating certain provisions contained in the German legislation.

5.1 Challenges in South Africa

Although South Africa became an emerging economy by undergoing a phase of economic and social development, it still faces serious challenges. Poverty remains the central problem. As indicated in Chapter 1, economic growth declined and aggravated the situation in the labour market. Unemployment, the phenomena of the working poor as well as structural domestic barriers are core issues which shall be enhanced by means of introducing a statutory minimum wage. However, other factors such as large household size creating very low average household income or global economic stagnation also have big influence on poverty.

Regarding the present system of wage-setting, different problems occur. First to mention, there are still conflicts among employers and employers' associations. For instance, the National Employers' Association of South Africa (NEASA) did not accept an agreement set up by the Steel and Engineering Industry Federation of South Africa (SEIFSA) and the National Union of Metalworkers of South Africa (NUMSA). Moreover, the NEASA alongside the United Textile and Clothing Association (UTCA) try to impede the extension of bargaining council agreements to non-parties.¹⁹⁰

Second, the legacy of the Marikana tragedy in August 2012, where 34 striking workers were killed by the police, reflects the deep-seated problems within industrial relations in South

¹⁹⁰ Trenton Elsey & George Mthethwa 'Wage Determination in South Africa since 1994' (2014) in *Bargaining Indicators 2014 – A Labour Perspective* 11.

Africa. Strike violence as experienced at Marikana is closely linked to high numbers of unemployment, soaring poverty levels and the dramatic income inequality characterizing the South African labour market.¹⁹¹ In that regard, just months before the Marikana tragedy *Nicolson* warned:

‘If employees are working 14 hours a day for R4 500 per month, backed by a highly mobilised union and upset over the salary of executives, they’ll strike, legal or not’.¹⁹²

Accompanied by other factors frustrating South African workers, including apparent intransigence of management, the protracted duration of the strike, a lack of strike pay and trade union support, strike violence still impedes collective bargaining and its idea of maintaining industrial peace. Especially with regard to Marikana, the role and loyalty of majority unions was debated intensively. Thus, many analysts were convinced that the relevant National Union of Mineworkers (NUM) contributed immensely to the tragic events.¹⁹³ Moreover, aiming that all workers ideally shall have a voice, the call for strengthening smaller unions got louder as workers lost faith in large unions during the negotiation process.¹⁹⁴

Thirdly, like in many other countries, the collective bargaining system in South Africa depends on effective organisation by workers. Among other difficulties to organize workers, global value chains pose a major challenge. The internationalisation of production gave rise to the concept of global commodity chains (GCCs). Contrary to the concept of Henry Ford, new technology makes it more efficient and cheaper to produce single component parts separately. The externalisation of processes established new forms of labour force, consisting of ‘temporary, part-time and ‘self- employed’ workers under ‘personal contracts’’. This made collective bargaining and organising workers very difficult as these value chains cut numerous sectors with various employers being involved.¹⁹⁵

¹⁹¹ Tembeka Ngcukaitobi ‘Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana’ (2013) 34 *Indus. L.J.* (Juta) 846.

¹⁹² Greg Nicolson ‘Labour Law Amendments Provoke Unions’ Ire’ *Daily Maverick* 5 April 2012, available at <https://www.dailymaverick.co.za/article/2012-04-05-labour-law-amendments-provoke-unions-ire/#.WntF0pP1VE4>, accessed on 7 February 2018.

¹⁹³ Koboro J. Selala ‘The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis’ (2014) *IJSS Vol. 3/No. 5/special issue/2014* 122.

¹⁹⁴ Ngcukaitobi ob cit note 191 at 854, 856.

¹⁹⁵ Bob Hepple ‘The Future of Labour Law’ (1996) 17 *Comparative Labor Law & Policy Journal* 627, 628; Mario Jacobs ‘Bargaining along value chains – the changing nature of collective bargaining in South Africa’ (2017).

5.2 Scope

To avoid an undermining of the minimum wage pay and to effectively enhance the wage situation of many workers, the minimum wage needs to have a broad coverage and should consist of the actual remuneration.

5.2.1 Application

Generally, section 4 of the Bill stipulates a broad coverage as the minimum wage shall apply to every worker. However, as seen above, the Bill also includes tiered levels of minimum wages for certain groups of workers as well as the possibility of applying for an exemption. This model differs from the German approach, which incorporates universal coverage of a common wage accompanied by specific exclusions for groups which shall not enjoy minimum wage pay for different reason. In the following, it will be shown that the drafters of the Bill rightly decide to choose the tiered approach. Statutory minimum wages are a strict tool to regulate to labour market. Introducing them always pose the challenge to adequately accommodate the domestic low-wage sectors and carefully consider specific groups of workers and different types of businesses. Nevertheless, it seems not expedient to combine the tiers with a general exemption mechanism as this would jeopardise the universal coverage of the minimum wage.

5.2.1.1 *Multiple minimum wage rates*

The different minimum wage levels are listed in section 2 of Schedule 1 of the Bill. It is notable, that each group considered for differentiation by the Bill is also internationally recognised as specifically accessible for a different treatment.¹⁹⁶ Although the Bill does not exclude these groups from the application of the minimum wage act, it stipulates lower minimum wage tiers that can be phased out over time. Therefore, the term ‘exclusions’ might be a bit misleading.¹⁹⁷ Both, level differentiation and exclusions are considered to reduce negative impacts

¹⁹⁶ Agricultural workers, domestic workers, workers in public services and apprentices and trainees were specifically mentioned in the first report on the application of ILO Convention No. 131 (Minimum wage systems op cit note 78 at 37) and are in practice the most frequent groups excluded from minimum wage systems (The ‘ILO Minimum Wage Policy Guide’ [Geneva, ILO, 2016] 33).

¹⁹⁷ Konopelko precisely speaks of “excluded sectors” [which] are not excluded entirely but rather have a differentiated minimum wage pegged to a certain percentage of the national minimum wage as part of a tiered national minimum wage system.’ (Elena Konopelko ‘Exclusions and Exemptions from a National Minimum Wage System’ *Policy Brief#3* [Wits University 2016] 2).

particularly on employment in ultra-low wage sectors. The ILO does not prescribe a certain approach and highlights the different difficulties:

‘While a system based on a single minimum wage may have the disadvantage of not reflecting the payment capacities of all employers across the country, it has the advantage of simplicity, which makes it easier for employers and workers to know the minimum wage rate applicable to a particular employment relationship, and for the labour inspection services to enforce the relevant provisions. On the contrary, the more complex a minimum wage system is, and the more sectoral, occupational and geographical rates it involves, the more difficult it is to monitor, particularly in countries where the labour administration services have very limited resources.’¹⁹⁸

Contrary to many other countries, South Africa only set up lower minimum wages for particular groups due to their specific job loss vulnerability.¹⁹⁹ Given that often even industrialized countries still exclude industries from statutory minimum wages, the South African model offers at least minimum protection including the possibility for these groups to benefit from future wage adjustments.

As pointed out by the ILO, simple minimum wage systems containing only one rate are easy to operate, communicate and enforce. Nevertheless, they offer less scope to consider specific economic circumstances within a country.

A multiple system as chosen by South Africa therefore is easier to adopt to local circumstances of different industries. The Bill just mentions four different groups only entitled to claim a lower minimum wage.²⁰⁰ As a result, this makes the whole minimum wage system clear and easy to comply with. The occurrence of different rates depending on the sector of activity or state of education follows a certain logic, considering experts concerns while the minimum wage policy was designed.

Based on the premise that

¹⁹⁸ Minimum wage systems op cit note 78 at 99.

¹⁹⁹ Ibid at 46.

²⁰⁰ Section 2 of Schedule 1 of the Bill

‘[e]very worker has the right to the same minimum wage and workers and their families all have the same needs, independently of the sector of work’²⁰¹,

the ILO describes in its Policy Guide five major factors which may justify different minimum wage rates:

Regional. There are significant regional differences in the cost of living, economic development, and labour market situation within a same country.

Sector. Some sectors of activity have higher average productivity and "capacity to pay" than other sectors, and can afford higher minimum wages.

Occupation. Certain occupations may be more skilled than others and workers in these occupations have a higher level of productivity.

Enterprise size. Smaller enterprises may have lower productivity and subsequently a lower average capacity to pay.

Population. A high general minimum wage may act as a barrier to the employment of the members of some groups such as young workers, trainees, or workers with disabilities.²⁰²

The Bill and its underlying policymakers considered these factors. Agriculture, domestic work and public employment programmes are among the most vulnerable sectors in terms of job losses as full-time workers earn very low wages.²⁰³ Excluding these key low-wage sectors from minimum wage pay would leave the most vulnerable workers behind, which would undermine the key issues to mitigate inequality and working poor. Therefore, it is reasonable to balance the risk of job loss due to the sectoral lack of capacity to pay and a minimum wage protection through introducing a tiered system. Moreover, international evidence has shown, that vulnerable workers in countries with tiered minimum wages use to have higher average wages compared to vulnerable workers in countries that exclude certain vulnerable sectors completely from the application of the minimum wage legislation.²⁰⁴ As long as a universal minimum wage is economically not bearable, a tiered system is more favorable than excluding entire sectors from the safety-net of minimum wages.²⁰⁵

²⁰¹ The ‘*Minimum Wage Policy Guide*’ (Geneva, ILO, 2016) 16.

²⁰² Ibid.

²⁰³ Castel-Branco op cit note 177 at 14.

²⁰⁴ Konopelko op cit note 197 at 5.

²⁰⁵ Ibid.

Closely related to the criteria of productivity and occupation, the Bill stipulates other minimum wages for workers participating in learning programmes.²⁰⁶ There are two internationally recognised reasons for a differential treatment of that group: first, apprentices are learners not workers, who are getting trained and thus are less productive; second, employers shall continuously be incentivised to provide learning agreements.²⁰⁷ However, providing the same wages for learners as qualified workers has also various advantages:

‘it ensures that workers who are undergoing training are not trapped in a cycle of working poverty and are able to meet their basic needs and those of their families; it removes the incentive to replace positions for qualified workers with learnerships, thus ensuring career progression for qualified workers; it reinforces the function of apprenticeships as an entry point into a long, productive career; and it reduces downward pressure on the wages of qualified workers.’²⁰⁸

Having in mind these advantages it seems questionable if the inclusion of learners in the minimum wage system at lower wage tiers is reasonable. In that regard, *Castel-Branco* refers to various incentives offered by the South African government to employers in order to compensate potential extra costs due to lower productivity and training.²⁰⁹ Although one may argue that because of these existing incentives it is only fair to fully apply the minimum wage on learners, the Bill reasonably incorporates a special minimum wage mechanism for this group. According to section 2(d) of Schedule 1 combined with Schedule 2 of the Bill, learners are entitled to claim minimum allowance, depending on their current level of qualification and personal performance. This tiered approach incentivises learners to perform properly and ensures a certain minimum wage level which is even higher than the NMW at a certain stage. Therefore, one can conclude that the Bill offers even more wage protection to learners than its German counterpart, which expressively excludes them from minimum wages.²¹⁰ Furthermore, this qualification and performance-based approach takes into account the principle of ‘equal pay for equal work’ and incentivises employers to adjust wages of qualified workers adequately in relation to the statutory minimum allowances for learners.

²⁰⁶ Section 2(d) of Schedule 1 of the Bill.

²⁰⁷ *Castel-Branco* op cit note 177 at 15.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* at 16.

²¹⁰ See section 22(3) MiLoG.

To conclude, even though South Africa has chosen a contrary minimum wage system than Germany, the multiple minimum wage rates as stipulated in the Bill are in accordance with ILO and international standards. Apart from the civil servants enumerated in section 3, the Bill focuses rather on tiers than on specific exclusions from the minimum wage.²¹¹ This is a challenging approach for an emerging economy like South Africa but may be more promising in terms of poverty alleviation than excluding vulnerable low-wage sectors completely from the safety net established through a minimum wage. As a positive, this system of tiered minimum wages cannot be used as an excuse to create an ultra-low NMW and allows some flexibility.²¹² Moreover, the social partners can still set higher wages than the NMW by concluding collective agreements.

5.2.1.2 Exemptions upon application

Contrary to exclusions, exemptions release individual employers from their obligation to pay the full statutory minimum wage for a certain period of time.²¹³ The intention of exemptions is to bridge the transition phase until an employer has built up capacity to pay the minimum wage.²¹⁴

Whereas the German MiLoG focuses on exclusions for certain groups, the Bill incorporates a legal framework, which provides every employer or employers' organisation registered in terms of section 96 of the LRA the possibility to apply for an exemption from paying the NMW. To effectively pursue its objective of primarily being a social protection and poverty reduction mechanism, the ILO recommends establishing a NMW coverage as wide as possible. In that regard, the ILO further states that

‘[i]n order for the minimum wage to be an effective policy of social development, the number of exemptions and exclusions should be as few as possible (ILO, 2014)’.²¹⁵

Considering this recommendation, a general exemption mechanism as stipulated in the Bill might pose the risk of being a gateway to undermine the minimum wage coverage. South Africa

²¹¹ Although civil servants often get paid more than the minimum wage, pre-existing administrative arrangements that rule wages and other labour-related procedures do not reasonably explain their exclusion from minimum wage protection (Konopelko op cit note 197 at 6).

²¹² Konopelko op cit note 197 at 3.

²¹³ Ibid at 2.

²¹⁴ Castel-Branco op cit note 177 at 13.

²¹⁵ Konopelko op cit note 197 at 2.

is still an emerging economy facing key challenges such as very high levels of unemployment, inequality and low economic growth. This having been recognised, the relevant provisions must be evaluated.

Internationally, the combination of exclusions, exemptions, and differentiated minimum wages is a common approach. In terms of an exemption mechanism for employers one can distinguish between provisions granting exemptions for (a) vulnerable or special employers like family businesses, small enterprises or charitable organisations and (b) ‘special economic reasons’ on a case-by-case basis.²¹⁶ Accordingly, the South African exemption mechanism, which is inspired by the existing mechanism in the LRA and the BCEA can be assigned to the latter. Although a general exemption mechanism logically poses the risk of narrowing down the minimum wage coverage, it may be expedient as long as the legal provisions are shaped properly to avoid abuse. To assess whether this mechanism may in fact be useful one must examine and evaluate its advantages and disadvantages.

It is without doubt, that paying minimum wages is currently unaffordable at least for some employers due to various - predominantly economic - reasons. Instituting exemptions on application creates one possibility to assist these employers during their transition period to the national minimum wage system. The exemption system as stipulated in section 15 of the Bill gives the Minister autonomy and flexibility to decide on exemption policies and applications on case-by-case basis considering industry-specific factors.

However, still, the key question remains how to ensure that only those employers who cannot afford to implement the minimum wages obtain an exemption. Granting exemptions upon application is a familiar approach in international practice.²¹⁷ Universally, applicants must substantiate their claim that paying minimum wages is unaffordable for good reason. It is problematic, however, to establish specific criteria and requirements which must be met to obtain an exemption. In that regard, the Bill is not specific, however it does provide that the Minister may issue regulations concerning the form and way exemptions must be made, including the procedure and content of the application and the criteria that must be applied while evaluating these applications.²¹⁸ Internationally, common criteria are the number of

²¹⁶ Ibid.

²¹⁷ Ibid at 12.

²¹⁸ Section 16(1)(a) of the Bill.

employees, annual turnover and family relationships accompanied by the requirement of financial documentation proving ‘unaffordability’.²¹⁹

Assuming these criteria would become common practice over time in South Africa, abuse still would not be unlikely. Regarding the number of employees, evidence is given that exemptions based on that criteria tend to create disincentives for small enterprises to grow and employ more workers because by doing so they would become subject to national minimum wage legislation.²²⁰ In addition, some South African industries predominantly consist of small companies.²²¹ Employers in these sectors could illegally mask employees as volunteers or interns to undermine the minimum wage application.²²² Thus, that criterion risks to introduce a de-facto blanket exclusion for workers in small enterprises, contrary to the minimum wage idea to set a decent wage floor. However, the idea to take a company’s turnover as a basis is also not unproblematic as some enterprise may provide illegal accounting schemes to hide their real turnover. In South Africa, corruption is still a structural problem which does not exclude the public sector and therefore may foster the abuse of illegally granting applications.²²³

On the other hand, the Bill incorporates some simple provisions to restrict possible abuse. According to section 15(2)(a) of the Bill, applicants can only apply for permission to not pay the (full) minimum wage for no longer than one year. Consequently, the granting expires after a limited period and a new assessment must be conducted. Moreover, in case of a successful application, the employer is not free to decide unilaterally how much he is willing to pay because the granting must specify the wage and needs to contain ‘other relevant condition’. Besides, regulations constituting procedures and assessment criteria can only be issued by the Minister after consulting NEDLAC and where appropriate the Commission.²²⁴ Furthermore, to ensure public transparency, the Minister must publish the final drafts and enable participation of interested parties.²²⁵

However, international experience has been made with exemption systems designed for small and medium-sized enterprises, which claimed that minimum wage pay would be unaffordable for economic reasons.²²⁶ Here, the general exemption system goes beyond and is not

²¹⁹ Konopelko op cit note 197 at 12.

²²⁰ Ibid at 11.

²²¹ E.g. textile sector (ibid at 12).

²²² According to the Low Pay Commission Report 2015, this has been documented in the UK (ibid at 11).

²²³ Gareth Newham ‘Why is Corruption is Getting Worse in South Africa’ *Corruption Watch* 17 January 2014, available at <http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/>, accessed on 7 January 2018.

²²⁴ Section 16(1) of the Bill.

²²⁵ Section 16(2) of the Bill.

²²⁶ Konopelko op cit note 197 at 12.

exhaustible in terms of possible applicants and relevant reasons for granting exemptions. A general look at the domestic exemption practice under the rules of the LRA and the BCEA however raises serious doubt that this exemption-upon-application approach suits best for South Africa. So far, neither the Department of Labour, nor bargaining councils have issued clear and specific criteria for exemptions and related special indicators to weigh them adequately.²²⁷ Having in mind the vague criteria used for assessment and the lack of transparency concerning the reasons why some exemptions are granted while others were not, it is surprising that the success rate of exemption applications stays constantly high.²²⁸

To conclude, some major problems raised by the current South African exemption mechanism are addressed by the Bill, including the establishment of criteria for exemptions, the body responsible for assessment or transparency issues. However, serious concerns regarding large scale exemptions still remain. This leads to the result that due to extremely low wages and high risks of abuse, at present, South Africa does not have the ideal conditions to implement an exemption-upon-application mechanism for the NMW.

It can be assumed that this new application mechanism predominantly will be used as a business-related exemption possibility as research attested that over 80 percent of exemption applications under the present framework come from small and medium-sized enterprises.²²⁹ Considering the costs arising through the administration and enforcement system, the concerns stated above and the initial purpose of the exemption mechanism, a better and simple solution would be to include certain businesses in the tiers with an option of phasing out. This approach would make a general exemption mechanism dispensable and ensures minimum protection to a certain scale by allowing some businesses to pay only a specified lower proportion of a general minimum wage. In default of a hardship provision for vulnerable employers, the South African legislator should instead concentrate on providing the possibility to apply for special government grants. This approach would reduce the risk of abuse and would shift it from employees earning the lowest wages towards the state. A continuous obligation for employers to provide financial documentation proving ‘unaffordability’, possible sanctions in case of abuse and part-repayment obligations could complete a legal framework for government grants.

²²⁷ Ibid at 3.

²²⁸ Ibid.

²²⁹ Ibid.

5.2.2 Components

Another important factor concerning the efficiency of the Minimum Wage Act is the composition of the minimum wage itself. The ILO understands wages to be the payment, an employer makes to his employees in return for their work performance by stating that

‘...the term wages means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered’.²³⁰

Generally, total wages or earnings consist of different components. Apart from basic pay, wages often include regular bonuses, in kind benefits or special performance pay.²³¹ This having been said, it becomes clear that depending on the components which count towards compliance with the minimum wage, the payments for workers may vary due to employers’ practice to remunerate.

By excluding any kind of payment rewarding other matters than productivity and performance as well as remuneration in kind, section 5 of the Bill narrows down the elements making up the minimum wage to the basic pay.

Payments in-kind may limit or decrease the financial income of workers in case they are inappropriate for the personal use or if their value does not compensate the value attributed. To avoid this risk of abuse, section 5(1) of the Bill prohibits in-kind payments to be considered as part of the minimum wage. This prohibition policy is meaningful as employers do not have the possibility to undermine minimum pay by providing non-cash benefits to employees which might lead to a total income that does not cover the basic costs of living.

Unlike the Bill, the German MiLoG does not explicitly define the elements of the minimum wage. This lack of clarity was even objective to a decision of the Federal Labour Court which

²³⁰ Article 1 of the ILO Protection of Wages Convention, 1949 (No. 95)

²³¹ Collective bargaining: a policy guide op cit note 92 at 10.

identified that even remuneration in kind (such as company car use or meal vouchers) may be part of the minimum wage as long as it rewards work performance.²³²

5.3 Minimum wage level

It is without doubt that a crucial issue within the minimum wage policy lies in the level of the minimum wage. Hence, it will be examined if the levels have been set adequately according to South African circumstances. Subsequently, focus will be put on the mechanism to adjust these levels before assessing whether it is expedient to set up the levels for hourly minimum wages.

5.3.1 Tiered system

Minimum wages always face the challenge of on the one hand establishing a decent wage floor to ensure the lowest paid workers' basic needs and being economically affordable for employers on the other.

As already mentioned, with Schedule 1 as adjusted in terms of section 6, the Bill incorporates four different national minimum wage tiers ranking from R11 to R20 and a special calculation base for workers who have concluded learnership agreements.

5.3.1.1 Balanced and evidence-based approach

The balanced and evidence-based approach is commonly recognised. It has its legal basis in article 3 of the ILO's Minimum Wage Fixing Convention No. 131, which emphasizes that

‘[t]he elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include –

(a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;

(b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.’

²³² See Federal Labour Court (BAG), decision of 21 December 2016 (5 AZR 374/16).

The needs of workers are usually measured by using poverty lines or living wage benchmarks. Whereas the former often gets estimated by defining low pay as wages below two third of median wage, the latter gets calculated by considering daily average costs for a basic living standard, including cost of food, housing, healthcare and education.²³³

6.3.1.2 Tiers

According to Schedule 1 of the Bill, the general NMW amounts R20 per hour, which is equivalent to approximately R3,500 per month. This amount is based on a 40-hour working week with a daily work of eight hours. The determination of a meaningful level for the NMW requires the consideration of four major aspects: (1) the wage distribution in South Africa; (2) basic living expenses; (3) employment effects; and (4) economic affordability for employers.²³⁴ As indicated in Section 2.2.2, nearly 50 percent of all employed people earn less than R3,500 per month and nearly 35 percent earn even less than R2,500 per month. These figures show that an hourly wage of R20 leads to a significant wage increase for many workers.

Basic living expenses are the needs of workers as understood by the ILO. Considering household size and the fact that in South Africa many households are dependent on only one earner, a monthly minimum wage at R4,050 would be needed to lift the families belonging to the quintile with the lowest income out of poverty.²³⁵ Consequently, a minimum wage of R20 would not directly lift them out of poverty but though would enhance their living conditions noticeably. The second quintile will be offered the chance to exceed the poverty line. Supporting this approach, the Provincial Secretary of the Young Communist League in Gauteng *Mdakane* confirmed:

‘While the proposed R3 500 can't lift the poorest South Africans out of crippling poverty, it would go a long way in offering relief to 41.6 percent of workers earning less than R3 000 a month.’²³⁶

²³³ NMW Panel Report op cit note 28 at 26.

²³⁴ Castel-Branco op cit note 177 at 7.

²³⁵ According to the numbers of the Development Policy Research Unit (DPRU), 2016, this quintile had an average household size of 5.2 and a monthly household income of R1,671 (NMW Panel Report op cit note 28 at 65).

²³⁶ Tim Forstall ‘South Africa's Bad Decision On The R 3,500 Minimum Wage - It's Too High’ *Forbes* 21 November 2016, available at <https://www.forbes.com/sites/timworstall/2016/11/21/south-africas-bad-decision-on-the-r-3500-minimum-wage-its-too-high/#4307d8df762f>, accessed on 7 February 2018.

Possible employment effects play a major role while examining an initial minimum wage level. As it is very difficult to precisely predict employment impacts, concerns should neither be overstated nor underestimated. Domestically and internationally researchers present different findings.²³⁷ However, there is agreement on the fact that minimum wages if set far too high will impede employment.

With regard to the huge wage inequality, the heterogeneity of wages and the immense low-wage sector which characterises the South African labour market, some experts are concerned that the majority of businesses will not accept the minimum wage at that level due to the rise in costs.²³⁸ Their argumentation line is based on the low economic job value which does not allow a minimum wage level to that extent.²³⁹ The economic job value is determined by the amount an employer is willing to pay to get benefit out of the labour. This amount in turn, depends on the local productivity of labour. Regarding an adequate level, the guideline being used clarifies that minimum wages should never exceed the threshold of 45 to 50 percent of the median wage; otherwise they are set too high and cause job loss.²⁴⁰ Referring to the countries low employment-to-population ratio, proponents criticise that in South Africa wage levels are already too high for local productivities.²⁴¹ The assessment that productivity of labour must rise can be supported by taking a look at the Global Competitiveness Index. Accordingly, South Africa has its worst results in terms of labour market efficiency, including the categories 'pay and productivity' and 'flexibility of wage determination'.²⁴²

Nevertheless, the Panel claimed that it sufficiently considered economic and affordability criteria, including the mean and median wage level. Hence, according to their guideline

'[national minimum wages] can be as high as one times the median and as low as 0.32 time the median.'²⁴³

A monthly wage of R3,500 would amount 0.33 of the mean and 0.67 of the median wage.²⁴⁴ Considering the ratios to means and median observed internationally by the ILO, the NMW would clearly not exceed the maximum levels in emerging economies. Given that minimum

²³⁷ NMW Panel Report op cit note 28 at 74.

²³⁸ Sam Mkokeli & Mike Cohen 'Minimum wage: SA moves to calm labour market' *Business Report* 22 November 2016, available at <https://www.iol.co.za/business-report/economy/minimum-wage-sa-moves-to-calm-labour-market-2092103>, accessed on 7 February 2018.

²³⁹ Ibid.

²⁴⁰ Forstall op cit note 236.

²⁴¹ Ibid.

²⁴² Klaus Schwab 'The Global Competitiveness Report 2016–2017' (World Economic Forum 2016) 325.

²⁴³ NMW Panel Report op cit note 28 at 68.

²⁴⁴ Ibid at 70.

wage levels are always a matter of dispute among economists and hardly predictable in terms of employment effects in case they are not set evidently too high, R20 seem legitimate particularly in international comparison. Even if there will be small negative impacts on employment in certain industries, these effects would probably neither threaten macroeconomic balance nor impede economic growth.²⁴⁵ Instead, the NMW has the potential to stimulate overall macro- and micro-economic effects.²⁴⁶ Weighted against possible positive contributions towards poverty alleviation, income equality and economic growth, the wage level tend to be an acceptable trade-off.

In addition to the general minimum wage level of R20, the Bill sets up special wage-tiers for domestic workers, workers in agriculture and workers employed on an expanded public works programme.

Agriculture and domestic work are among the sectors with the highest number of workers earning below R20 per hour.²⁴⁷ Having additionally the lowest average income, both sectors would experience a significant wage bill increase of over 30 percent in comparison to other sectors which have a wage bill rise of only 10 percent.²⁴⁸ As a result, it becomes evident that these two sectors need differential treatment to lessen negative employment effects due to unaffordability. As domestic workers have a lower average wage income than farm workers, the tiered wages of R18 and R15 are justified and expedient. Although it may seem ethically not fair to pay the lowest wage-earners less than others, it is essential to not risk their vulnerable jobs with good intention. Similar approaches are also conducted internationally: whereas twelve percent of all minimum wage countries even excluded these sectors from minimum wage application, it is common practice to adopt tiered wages amounting between 60 and 80 percent of the NMW.²⁴⁹

Regarding workers employed on an expanded public works programme, a lower minimum wage level is reasonable due to the programmes intention of providing work and training opportunities for unemployed people to alleviate poverty and unemployment. Besides, every year over one million temporary workers participating in this programme only earn a daily

²⁴⁵ Asghar Adelzadeh & Cynthia Alvillar ‘The impact of a national minimum wage on the South Africa economy’ (Wits University 2016) 55.

²⁴⁶ Ibid at 53.

²⁴⁷ Source: Statistics South Africa, LMDSA (2014) adjusted to October 2016 prices; NMW Panel Report op cit note 28 at 76.

²⁴⁸ In 2016, 30 percent would be the estimated rise in wages if the minimum wage would be set at R3,902, which is equivalent to a simulated minimum wage level at R3,400 in 2014 (NMW Panel Report op cit note 28 at 72).

²⁴⁹ Konopelko op cit note 197 at 6.

wage of R75.²⁵⁰ As it is therefore not possible to immediately include them into the general minimum wage level, it is though fair to introduce a tier which indicates that they are not ‘left behind’.

Given that exemptions from general minimum wage pay presumably are intended for smaller businesses and financially weak employers, the tiers stipulated in the Bill are not complete.²⁵¹ Unlike the German MiLoG, the Bill did not integrate volunteers and interns in its tier-system. As these types of employment typically get very low or even no wages, an adjustment would be necessary in case legislation will be implemented without a general exemption mechanism. Moreover, clarification would be desirable regarding the fact that minimum levels generally refer to gross wages and that existing tiers shall be gradually phased out over time.

5.3.2 Adjustment mechanism

Politics, inflation increase and other changing circumstances have effects on wages.²⁵² As changing conditions or negative impacts on the labour market may harm the effectiveness of a NMW, its level must be adjusted recurrently.

5.3.2.1 Conduct

Consistent with the balanced and evidence-based approach for the initial wage setting, section 7 of the Bill sets up the major factors which must be considered while drafting an adjustment recommendation. In contrast to a simple formulaic mechanism, these factors urge the Committee to focus evidence based on the monitored minimum wage impacts as well as the current labour market situation, economy and living expenses. This mechanism was proposed by the Panel, which justified their view by stating that a specific mathematical formula is not able to supersede social dialogue and predict future challenges.²⁵³ Like section 9(2) and (4) of the MiLoG, the Bill refers to the key issues to which the Committee must give attention to: first, the needs of employees; second, the affordability of employers; and third, the macroeconomic environment.²⁵⁴ Having in mind the complexity of the South African labour

²⁵⁰ Ibid.

²⁵¹ Compare section 5.2.1.2.

²⁵² NMW Panel Report op cit note 28 at 30.

²⁵³ Ibid at 81.

²⁵⁴ Section 7 of the Bill.

market and economic difficulties, this flexible approach cannot be criticised and seems reasonable.

To ensure the participation of the social partners, the Bill establishes a Commission consisting of employers' and employees' representatives as well as members of organised community and supporting independent experts. Like Germany and nearly 50 percent of the countries with minimum wage legislation, South Africa decided to adopt a mechanism which requires the executive to adjust the minimum wage following consultation or recommendation of a specialised body.²⁵⁵ The decision-making process in South Africa is transparent and comprehensive. Whereas in Germany the government is entitled to give force to the Commissions' recommendation, in South Africa, the Commission must justify and clarify its recommendation upon the Ministers' request. A 'tripartite minimum wage fixing machinery' is typically characterised by the fact that the Commission is the decision-making authority in case of disagreement with the executive on the fixing of the minimum wage level.²⁵⁶ The Bill, however, stipulates that even though the executive cannot amend the Commissions' final recommendation, it must approve it before the legislature finally must authorize the adjustment by not issuing a contrary resolution.²⁵⁷ This procedure ensures not only participation of the social partners but also reciprocal control of all institutions involved. In comparison to the German mechanism, the Bill enables the legislature to intervene ultimately.

The German model is based on strong confidence to the decision-making Committee and particularly the social partner. Although an implementation of the recommendation through the executive is needed to give legal effect to the minimum wage level amendment, this executive act is in fact a matter of form. In practice, the executive is bound to the recommendation and not entitled to disapprove it.²⁵⁸ This mechanism ensures that the decision-making power belongs to the social partners, which not only have expertise but also a strong interest in a fair outcome. Advisory members of the Committee contribute during the process of adjustment with their special economic expertise. In case of a tie, the chairperson who is appointed by the government upon the joint proposal of the central employer and employee organisations, shall decide independently.²⁵⁹ As there is no need of further confirmation of the recommendation,

²⁵⁵ NMW Panel Report op cit note 28 at 87.

²⁵⁶ Minimum wage systems op cit note 78 at 54, 59.

²⁵⁷ Section 6(6) and (7) of the Bill.

²⁵⁸ 'Mindestlohn: 8,84 Euro seit dem 1. Januar 2017' *Deutsche Handwerks Zeitung* 28 June 2016, available at <https://www.deutsche-handwerks-zeitung.de/mindestlohn-steigt-zum-1-januar-2017-auf-884-euro/150/3094/332019>, accessed on 7 February 2018.

²⁵⁹ Section 10(2) MiLoG.

the process is time-effective and guarantees a well-grounded periodic adjustment of the minimum wage level.

In comparison to the German model, the Bill proposes a slightly different adjustment mechanism based on governments' approval and control through the National Assembly. On the one hand, this approach provides a high level of democratic legitimation and may intercept recommendations in case of obvious misjudgement by the Committee. On the other hand, in stating the Cabinets' approval as a prerequisite, section 6 of the Bill simultaneously enables the Cabinet to disapprove the recommendation with the consequence that the Minister cannot table the amended Schedules in the National Assembly. To conclude, the Cabinet has the power to block every amendment recommended by the Committee which may leave minimum wage adjustments very exposed to volatility. To avoid the risk that employers may eventually exercise influence over the Cabinet to hinder the implementation of amendments for economic reasons, it would be preferable to only give the Cabinet a right to comment on recommendations instead of a right to block them. Due to its function and size and the fact that it represents the society as a whole, the National Assembly is less vulnerable to external influence. Therefore, exclusive verification through the National Assembly would be sufficient for having a final scrutiny role in place.

5.3.2.2 Frequency of adjustment

Whereas section 9(1) of the MiLoG states an adjustment interval of two years, section 6 of the Bill stipulates an annual review of the minimum wage level. Most countries decided on an annual adjustment mechanism due to an estimated low and stable domestic inflation rate.²⁶⁰ According to the Panels expertise

‘South Africa’s inflation rates are stable enough to warrant a regular review period of the NMW and adjustments to the level that consider a broader range of factors than the inflation rate.’²⁶¹

Following this opinion, regular annual review accompanied by an adjustment recommendation is expedient as it ensures planning reliability for employers and employees as well as consistent response to changing circumstances. Furthermore, in contrast to a flexible rhythm of adjustment, an institutionalized annual adjustment mechanism can prevent deflationary wage

²⁶⁰ NMW Panel Report op cit note 28 at 83.

²⁶¹ Ibid at 84.

developments and mobilize union members to campaign for adequate adjustments of minimum wages.²⁶²

5.3.3 Minimum wage units

Concerning the question over what time period minimum wage rates shall be calculated, Germany and South Africa both decided on an hourly basis. Generally, minimum wages can be set for various time periods with different advantages and disadvantages.

A single hourly wage is transparent and clear and therefore simpler to monitor in terms of compliance.²⁶³ Additionally, employees are actually paid the minimum wage for every hour worked. However, introducing minimum wages on an hourly basis is particularly contentious because of the concern that employers may undermine the intended income increase for employees through a substantial reduction in working hours and a reorganisation of employment contracts.²⁶⁴ Especially in sectors predominantly consisting of casualised and seasonal work, workers receiving the minimum wage would have to be afraid of having less income at the end of the month than before the minimum wage introduction.

To avoid this, a monthly or weekly rate paid in exchange for ordinary hours of work of a full-time employee, as specified in the national labour laws seems useful. Although, setting longer reference periods may ensure that employees do have enough income to meet their basic needs, these reference periods easily result in unpaid overtime for workers.²⁶⁵

With regard to minimum wages set by sectoral determinations, South Africa already implemented various measures to ensure that an hourly minimum wage does not reduce the overall income of workers. Accordingly, inter alia higher wage rates for part-time workers or compulsory payments for a minimum number of working hours were established.²⁶⁶ The current approach as stipulated in the Bill, however, differs. To minimize the risk for workers of gaining less overall income due to the hourly minimum wage section 4(6) of the Bill rules that

²⁶² Hansjörg Herr & Milka Kazandziska 'Principles of minimum wage policy: economics, institutions and recommendations' *Global Labour University working papers; No.11* (International Labour Office. - Geneva: ILO, 2011 31) 9.

²⁶³ Castel-Branco op cit note 177 at 23.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid at 22.

‘[i]t is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage [...]’.

This provision is presumably well-reasoned. On the one hand, by generally qualifying certain adjustment channels as unfair labour practices, workers have the possibility to effectively legally protect their right to earn the minimum wage under consistent working conditions. On the other hand, employers who can prove that they cannot afford the increased wages proposed still have the option to adequately channel these additional costs through reorganisation of employment. In that case, an unfair labour practice (e.g. unilateral alterations to working hours) would be justified as an adjustment of employment conditions undoubtedly is preferable to a termination of employment.

This mechanism differentiates from the general exemption mechanism as proposed in section 15 of the Bill. Whereas the latter entitles the employer to pay less than the minimum wage at equal working time, the former still ensures that the employee get paid the minimum wage for every hour worked. In case an employer reduces working hours, he consequently gets less rendered work performance. Therefore, he will probably use this measure only if it is truly necessary. Taken together, the provision is well-balanced by addressing both, employers’ and employees’ interests.

In contrast, the MiLoG does not generally prohibit the unilateral altering of working hours in connection with the implementation of the NMW. Nevertheless, under German labour law, the employer is not entitled to do so without permission of the employee concerned. In case the employer issues a dismissal for variation of contract he needs to meet the strict requirements of social justification. Given that employees are already protected by existing labour legislation, further regulation within the MiLoG is superfluous.

5.4 Monitoring and compliance

5.4.1 International perspective and experiences in South Africa

The results which may be achieved by introducing a NMW obviously depend on employers’ compliance with their obligation to pay the hourly minimum wage. As indicated by the ILO, high rates of non-compliance do not only harm the workers concerned, but also adversely affects compliant employers, as non-compliant employers receive an illegitimate cost

advantage.²⁶⁷ Acknowledging that the extent of non-compliance not only depends on the minimum wage level, but also on the legal framework and supporting policies, article 5 of the Minimum Wage Fixing Convention, 1970 (No. 131) emphasises that

‘[a]ppropriate measures, such as adequate inspection reinforced by other necessary measures, shall be taken to ensure the effective application of all provisions relating to minimum wages.’

More precisely, in paragraph 14, the Minimum Wage Fixing Recommendation, 1970 (No. 135) itemizes measures that countries should incorporate in their minimum wage legislation in order to ensure the effective application of all provisions relating to minimum wages. This includes inter alia an effective monitoring system, targeted labour inspections, penalties as a deterrent to non-compliant employers and a simple procedure of legal protection for workers.

So far, South Africa can be described as a country with a rather low-compliance rate. According to statistical estimates, it had a compliance rate of less than 60 percent in the mid-2000s with a further decline in the late 2000s to about 50 percent.²⁶⁸ In 2011, non-compliance was not only varying across sectors, but was also significantly higher in rural areas and among disadvantaged groups.²⁶⁹ Bearing in mind these figures, it is obvious that the new minimum wage legislation needs to ensure higher rates of compliance.

As emphasized in section 4.6, a comprehensive approach includes both, incentives to strengthen voluntary compliance as well as effective monitoring and enforcement measures. The legal framework provided in the LRA and the BCEA to protect workers against unfair labour practices and enforcement of their rights, already include various measures proposed by paragraph 14 of the Minimum Wage Fixing Recommendation No. 135. The BCEA entitles labour inspectors to enter workplaces and stipulates that the ECC shall conduct further monitoring measures.²⁷⁰ In addition, the LRA procedure for unfair labour practices is extended by the Bill to certain practices related to the NMW. Besides, South Africa implemented measures to incentivise voluntary compliance.

²⁶⁷ Collective bargaining: a policy guide op cit note 92 at 53.

²⁶⁸ Uma Rani, Patrick Belser, Martin Oelz & Setareh Ranjbar ‘Minimum wage coverage and compliance in developing countries’ (2013) *International Labour Review*, Vol. 152, No. 3–4, *Special Issue, Informality across the global economy – subsistence, avoidance and violation* (Geneva, ILO) 391.

²⁶⁹ Ibid; Collective bargaining: a policy guide op cit note 92 at 57.

²⁷⁰ Section 64 et seq. of the BCEA.

Nevertheless, the high rates of non-compliance show that the framework in practice is not as efficient as it is supposed to be. Regarding the new NMW, non-compliance may occur in different forms. Instead of simply not paying the hourly minimum wage, employers may also undermine minimum wage pay through unpaid overtime pay or other impermissible adaptation measures.²⁷¹ To reduce non-compliance, it might therefore be useful to incorporate several provisions of the MiLoG to the new South African minimum wage legislation as well.

5.4.2 Incorporation of MiLoG provisions

Generally, the Bill has been framed rather clear and simple. Schedule 1 contains a manageable wage tiers and section 1 defines the relevant terms to avoid misinterpretation. Additionally, the decision to introduce a NMW on an hourly basis enhances compliance as it bolsters simplicity for both, employers and employees. However, in comparison to the MiLoG, the Bill remains silent on several procedures which can facilitate compliance.

As already proposed by the ILO, minimum wage legislation should also include possible penalties for non-compliant employers. These penalties can be tiered depending on the gravity of the non-compliance with the act. Hence, flexible provisions like section 21 and 19 of MiLoG can act as a model for a legal sanction regime. In this respect, the South African legislator already decided to insert section 76A in the BCEA, ruling that

‘a fine that may be imposed on an employer who paid an employee less than the national minimum wage, is an amount that is the greater of-

- (a) twice the value of the underpayment; or
- (b) twice the employee’s monthly wage.’

It remains to be seen whether this provision evolves a deterrent nature. In any case, the open wording of section 76A only sets a floor amount and provides an opportunity to adjust possible sanctions.

Furthermore, the establishment of an information centre as stipulated in section 12(3) of MiLoG should have been added to the Bill by extending the function of the secretariat to the

²⁷¹ See the possibilities of adapting working time in the introduction of the minimum wage: Jürgen Schupp, ‘Wer profitiert vom Mindestlohn?’ (2014) *DIW-Wochenbericht*, ISSN 1860-8787, Vol. 81, Iss. 6; ‘Umgehungsstrategien der Arbeitgeber: Popcorn statt Mindestlohn’, *Spiegel Online* 15 September 2015, available at <http://www.spiegel.de/wirtschaft/soziales/mindestlohn-die-umgehungsstrategien-der-arbeitgeber-a-1053039.html>, accessed on 7 February 2018; and Inga Höltnann ‘Wie Unternehmen den Mindestlohn umgehen’ (4 April 2015) *Tagesspiegel*.

Commission in section 13. This is an essential feature as international evidence has shown the importance of making information on minimum wage legislation available to employers, workers and the public.²⁷² Thus, with public awareness about applicable minimum wage rates, public monitoring and possible penalties for non-compliance, compliance may be higher. The high numbers of non-compliance have shown that the current approach to delegate this essential task to labour inspectors was not satisfying and therefore needs to be amended.²⁷³

Lastly, section 17 of MiLoG provides a special provision regarding special monitoring procedures for sectors with potentially high rates of non-compliance. Accordingly, employers who employ workers in specific low-wage sectors listed in section 8(1) of Volume IV of the Social Insurance Code (Viertes Buch Sozialgesetzbuch – SGB IV) and in section 2a of the Act to Combat Clandestine Employment (Schwarzarbeitsbekämpfungsgesetz - SchwarzArbG) are obliged to record commencement, end and duration of their employees' daily working time. Moreover, these records must be kept at the disposal for at least two years. This documentation requirements facilitate the control mechanism for authorities, especially in those sectors which are of particular importance due to low average wages and often missing written employment contracts. It might therefore be useful to integrate a similar provision either in Chapter 10 of the BCEA or into the National Minimum Wage Act itself.

Nevertheless, as emphasised in section 3.5.4, in Germany an unexpected large number of entitled persons earn less than the minimum wage. This number however declined but still shows that imperfections subsist as regards to the control and penalty mechanisms of the MiLoG.

Whereas on the one hand, the MiLoG provides important tools to enforce its obligations, it becomes very clear that it is equally important to efficiently implement these tools in practice. Therefore, in Germany the call for more frequent controls, more dissuasive and rapid sanctions, more efficient complaint procedures and more stringent requirements for the documentation systems (especially timekeeping) have become louder.²⁷⁴

South Africa may benefit not only by considering adding these legal tools incorporated in the MiLoG, but also by allocating the corresponding financial and practical means. This would include hiring sufficient qualified personnel to effectively conduct inspections and enforcement. As monitoring measures are time-intensive, in Germany they predominantly are

²⁷² Collective bargaining: a policy guide op cit note 92 at 58.

²⁷³ See section 64(1)(a) of the BCEA.

²⁷⁴ Burauel et al op cit note 168 at 509.

conducted in a risk-based manner, which means that they apply more often in industries where serious infringements are expected.²⁷⁵ Consequently, critics complain, this procedure ‘does not guarantee a systematic and comprehensive assessment of whether or not the minimum wage law is actually being applied’.²⁷⁶ Thus, the hiring of sufficient qualified personnel would ensure a more accurate assessment.

5.5 Alternative instruments

The introduction of a NMW is traditionally a highly contentious policy approach. Consequently, this section addresses the question whether other labour market policies may contribute more efficiently to the alleviation of inequality. Subsequently, it will be concluded that a combination of instruments adopted to South African circumstances presumably can be described as most effective and promising.

5.5.1 Labour market policies

Worldwide, minimum wage policies were introduced in order to respond to changing income distribution, which was thought could not be dealt sufficiently through the existing framework of the labour market policies and the institutions governing collective bargaining.²⁷⁷ Among other factors, the decline in the wage share, the increasing wage dispersion and public expenditure policies which presumably mostly privileged the rich were identified as drivers facilitating wage inequality.²⁷⁸

As mentioned above, in South Africa, a lot of workers earn very low wages. Shifting wages towards a level that people can take care of themselves and their dependents is therefore a key issue.

At present, collective agreements, extensions thereof and sectoral determinations constitute the main tools to set up wages collectively. However, several barriers (e.g. lack of coverage, declining trade union power, difficult industrial relations, high rates of non-compliance) impede these tools from achieving satisfactory results for all workers. Consequently, like in

²⁷⁵ See Bundestag document 18/11475 (2016): 19 (in German); German Bundestag document 18/7525, federal government’s answer, (2016): 1 (in German).

²⁷⁶ Burauel et al op cit note 168 at 521.

²⁷⁷ Herr & Kazandziska op cit note 262 at 1.

²⁷⁸ Ibid.

many other countries, experts discuss the adequate labour market policy to overcome these barriers.

Although South Africa has a well-structured labour relations framework, in practice, collective bargaining exposes various malfunctions. Generally, collective bargaining is often characterised through very long wage negotiations accompanied by industrial action which in turn often leads to intimidation and violence.²⁷⁹

Moreover, if wage negotiations reach an impasse, the parties usually declare them to disputes with the consequence that the responsibility of achieving an agreement is passed to the statutory dispute resolution body.²⁸⁰ Even though this mechanism intends to facilitate the conclusion of an agreement, in fact, it promoted the widespread inability of the parties to negotiate effectively.²⁸¹

Furthermore, the absence of sufficient social security provided by the state resulted in employers being confronted with societal issues such as housing, healthcare, transport and education as objectives to collective bargaining.²⁸² Shifting full responsibility for these sensible issues towards the employer even increases the burden on industrial relation.

Besides, often trade unions were not able or willing to push through their demands for higher wages. In 2012, only around 30 percent of all workers enjoyed coverage by collective agreements, regardless of whether they belonged to a trade union or not.²⁸³ This is a decline of nearly ten percent compared to 2008. According to the South African government, in 2014 collective bargaining coverage in the labour market declined even to approximately 15 percent.²⁸⁴ In contrast, the union density rate, describing is the percentage of workers belonging to a trade union stayed stable. Thus, over 25 percent of all earning workers are members of a trade union in 2015.²⁸⁵ Even though, coverage of collective agreements is not a guarantee for

²⁷⁹ Shane Godfrey, Jan Theron & Margareet Visser 'The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining' *DPRU Working Paper 07/130* (November 2007) 103.

²⁸⁰ Afzul Soobedaar 'Five Challenges Facing Collective Bargaining in South Africa' (30 January 2017), available at <http://www.perispec.co.za/insights/five-challenges-facing-collective-bargaining-in-south-africa>, accessed on 7 February 2018.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ 'Economic Policy Reforms 2017: Going for Growth' (OECD 2017) 329.

²⁸⁴ http://www.labour.gov.za/DOL/downloads/documents/tenders/minimumwages_tenders2014.pdf, accessed on 7 February 2018.

²⁸⁵ Economic Policy Reforms 2017 op cit note 283 at 329.

fair wages. For example, across the private sector bargaining councils agreed on a monthly wage of only R2731.74.²⁸⁶

The different kinds of measures being discussed to challenge income and labour market inequality must be seen in light of the above mentioned circumstances.

One option to reduce income inequality is the granting of public transfer payments for those earning less. Without doubt, this option of social contribution constitutes a heavy burden for the government's budget and is hardly suitable for countries low economic growth and weak government revenue. Moreover, it does not stop the race to the bottom on wages. New technology and international trade led to increasing externalisation and replacement of work by imports.²⁸⁷ Besides international agreements, one answer to combat wage dumping is the establishment of statutory wage floors. As employers generally benefit from global value chains and externalisation possibilities, it seems also legitimate to oblige them to pay minimum wages. Therefore, states shall be encouraged to grant social welfare but handled as a complementary policy to the minimum wage implementation.²⁸⁸

For a long time the relationship between the collective bargaining system and a NMW was at the core of the debate on implementing a minimum wage. Some proponents argued that wages should be negotiated exclusively by the social partners in interplay with a free market.²⁸⁹ Others favoured little governmental intervention to achieve general application by maintaining the possibility to extend collective agreements.²⁹⁰ Regarding the situation in South Africa, both argumentations are not convincing. Weak trade unions and poor collective agreement coverage were not able to comprehensively ensure decent wages which led to the introduction of sectoral determinations. To conclude, evidence has shown that collective bargaining alone is not able to protect the most vulnerable with the least bargaining power.

5.5.2 The need for multiple policies

Considering the various reasons for unequal distribution of income and unemployment in South Africa, one must confirm the ILO's stance that one single approach is unlikely to bring about

²⁸⁶ Investigation into a National Minimum Wage in South Africa 2.

²⁸⁷ Andries Bezuidenhout 'Towards global social movement unionism? Trade union responses to globalization in South Africa' *Discussion Paper DP/115/2000* (International Institute for Labour Studies, Geneva, 2000) 1.

²⁸⁸ Herr & Kazantziska op cit note 262 at 12.

²⁸⁹ Jeremy Seekings & Nicoli Nattrass 'What is at issue in the minimum wage debate?' (UCT January 2015) 2.

²⁹⁰ Ibid; see section 2.5.4.

a lasting structural improvement to these issues. Instead, in accordance to paragraph 1 of ILO Recommendation No. 135, it is expedient to combine different labour market policies, particularly pro-employment policies, transfer payments, and business incentives to ensure an environment for sustainable enterprises.

With regard to the different scope of minimum wages and collective bargaining, the ILO correctly recommends that

‘minimum wages should be targeted at the lowest-paid employees, while collective bargaining can set wage floors but should also promote wage increases for workers who also earn more than the minimum, in line with productivity growth.’²⁹¹

Thus, combining the effects seems to be a successful strategy to address the interests of both, the lowest-paid employees and other employees earning above the minimum wage.

As minimum wages set up in sectoral determinations in average also fall below an hourly wage of R20, a statutory minimum wage consequently would rise wages not only for workers not covered by any wage floor but also for a significant number of employees who do enjoy sectoral determination coverage.²⁹²

However, recently the Basic Condition of Employment Amendment Bill, 2017 repealed Chapter 8 and 9 of the BCEA and consequently transformed the existing sectoral determinations into static constructs without further adjustment possibility. This was justified by stating that

‘[t]hese chapters are deleted from the BCEA as they are being replaced by the national minimum wage, the National Minimum Wage Commission and transitional provisions that will set a certain period for the continued operation of sectoral determinations.’²⁹³

This governmental initiative is not conducive as it eliminates one pillar within the South African wage setting mechanism which should better complement the new minimum wage legislation. The system of sectoral determinations not only includes sectoral minimum wage

²⁹¹ Collective bargaining: a policy guide op cit note 92 at 76.

²⁹² ‘Across the SDs, the mean wage is R3,192 per month, and the median wage is R2,396 per month.’ (NMW Panel Report op cit note 28 at 54, 55).

²⁹³ See Government Gazette No. 41257 of 17 November 2017 221.

setting but moreover stipulates conditions of employment, which are not concerned by the NMW. By repealing this tool, the legislator withdraws the possibility to set unilaterally higher sectoral minimum wages in industries which are less vulnerable. Furthermore, an adjustment for other conditions of employment through sectoral determinations is also no longer possible. As there is no plausible reason to delete this tool, the repeal should be reversed in order to bolster the entire minimum wage legislation.

For similar reasons, the NMW also does not make the extension of collective agreements obsolete. It is reasonable to further an extend bargaining council agreements with wages exceeding the minimum wage and other employment benefits in case the social partners meet the requirements of section 32 of the LRA. A co-existence of a statutory minimum wage and sectoral minimum wages make up ‘hybrid minimum wage regime’ which in turn can stabilize the whole collective bargaining system.²⁹⁴

Taken together, the NMW may indeed contribute to an increase of social justice in South Africa as long as it is carefully designed and embedded in a labour market approach, based on multiple policies. Empirical evidence has shown that negative employment effects are largely channeled through employers’ adoption measures. Furthermore, they can be minimized by setting an adequate level and providing grants in hardship situation.

²⁹⁴ Till Kathmann ‘Zum Wechselverhältnis von Mindestlohn und Tarifpolitik’ *Working Paper No. 045* (August 2017) 42.

6. CONCLUSION

The NMW is an internationally well-known labour policy approach which intends to alleviate social injustice and poverty by mitigating wage inequality and facilitating economic growth. Although the economic and social situation in South Africa is different to the situation in Germany, both countries record a large low-wage sector and raising wage inequality leading to an increase of poverty.

Bearing in mind that well-intentioned labour regulations may sometimes have unfortunate or unintended consequences, the MiLoG tend to be a comprehensive framework which sensibly complements the existing collective bargaining system. It is well-balanced and considers major principles summed up by the ILO. This includes a universal coverage which gives the framework a clear and simple structure; an adjustment mechanism which ensures the participation of the social partners; and a system for monitoring and enforcing compliance with the acts provisions.

The overall provisional assessment of the new minimum wage legislation in Germany is rather positive. Although the low-wage sector did not decline substantially so far, most of the prognosticated negative effects did not occur. Instead, many workers now benefit from higher wages and economic growth increased. However, non-compliance and lacking capacity for adequate monitoring shows that success of minimum wage regulations depends on the interaction of two things: an efficient legal framework and a consequent implementation in practice.

Currently, South Africa faces big social and economic challenges. The introduction of the NMW must withstand a high rate of unemployment, slow economic growth and political uncertainty. Like in many other countries, globalization and new forms of employment have changed the South African labour market and gave birth to a huge low-wage sector. Unfortunately, until now the existing collective bargaining system was not able to resolve the problems of wage dumping and rising income inequality.

The proposed Bill provides an overall comprehensive legal framework. The manageable number of wage tiers takes into account special vulnerable sectors but still maintains simplicity; definitions and provisions regarding the calculation of the minimum wage ensure clarity and minimize misinterpretation.

However, the Bill also incorporates problematic provisions and should be complemented by additional amendments. First, the general exemption mechanism with limited assessment criteria may undermine the universal minimum wage application and should be replaced through a grant application mechanism for employers who are able to prove their inability to pay the minimum wage. Second, the government should not be entitled to unilaterally block the Commissions adjustment recommendations. This would impede possible interference from external interest groups and ensure a dynamic adjustment procedure. Finally, it seems expedient to complement the Bill by adding additional provisions in a manner comparable with the MiLoG. In that regard, setting up compulsory documentary requirements and the establishment of a competent information centre are of particular importance.

Given that especially the economic situation in South Africa is difficult, the introduction of the NMW bears more risks than in Germany. Nevertheless, weighing up possible negative employment effects against the likely benefits of substantial wage increases and economic stimuli leads to the conclusion that a well-designed minimum wage framework can indeed contribute to poverty alleviation. Among other policy approaches, the minimum wage should constitute one important pillar to enhance social justice and decent living conditions in South Africa. The National Minimum Wage Act as proposed by the Bill is improvable but its introduction is still preferable to inactiveness.

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